No. 06-____

IN THE
Supreme Court of the United States

Bounpone B. Sasouvong,
Petitioner,

v.

Washington,
Respondent.

On Petition for Writ of Certiorari
to the Washington Court of Appeals, Division I

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's right to a jury trial under the Sixth and Fourteenth Amendments is violated when a prior juvenile adjudication – not itself decided by a jury – is used by a judge to impose a longer sentence than otherwise would be permissible.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bounpone Sasouvong respectfully petitions for a writ of certiorari to the Washington Court of Appeals, Division I, in *State v. Sasouvong*, No. 779261.

OPINION BELOW

The relevant trial proceedings and sentencing (App. 4a) are unpublished. The opinion of the Washington Court of Appeals (App. 1a) is unpublished. The Supreme Court of Washington's order denying review (App. 3a) is unpublished.

JURISDICTION

The Washington Supreme Court denied review of this case on April 5, 2007. App. 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

Wash Rev. Code § 13.04.011(1) provides: "'Adjudication' has the same meaning as 'conviction' in [Wash. Rev. Code] 9.94A.030, and the terms must be construed identically and used interchangeably."

Wash. Rev. Code § 9.94A.525(2) provides: "Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if . . . the offender had spent ten consecutive years in the community without committing any crime . . . . Class C prior felony convictions other than sex offenses shall not be included in the offender score if . . . the offender had spent five consecutive years in the community without committing any crime . . . . This subsection applies to both adult and juvenile prior convictions."

STATEMENT

This case presents a pressing issue concerning the administration of criminal justice, over which the federal and state courts across the country are openly and deeply split. The question is whether a court may use a prior nonjury juvenile adjudication to impose a longer sentence than otherwise would be permissible. Acknowledging the deep divergence of authority on the issue, a divided Washington Supreme Court has held that a court may do so.

1. The State of Washington uses a determinate guidelines system for sentencing felony offenders. *See Blakely v. Washington*, 542 U.S. 296 (2004). Under this system, a defendant's presumptive sentencing range – that is, the range he may receive absent additional factual circumstances – is a function of his "offense level" and his "offender score." Wash. Rev. Code §§ 9.94A.530(1), 510. The higher these factors are, the more severe the presumptive sentence the defendant may receive.

Washington originally allowed judges to find certain facts that subjected defendants to more severe sentences under the State's sentencing grid than otherwise were allowed by guilty verdicts alone. This Court held in *Blakely*,

however, that this method of factfinding in this context implicated the "*Apprendi* rule" – that is, the Sixth Amendment's requirement that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In response to *Blakely*, Washington now requires all *offense*-related factors that affect defendants' upward exposure to be proved to a jury beyond a reasonable doubt. Wash. Rev. Code §§ 9.94A.530(3), 537(2); *see also id.* §§ 9.94A.125, 310(4)-(7).

These new statutory procedures, however, do not apply to facts that raise defendants' *offender* scores. Thus, Washington trial courts may find by a preponderance of the evidence facts concerning defendant's criminal history and may use those facts to impose longer sentences than otherwise would be permissible. Most importantly for this case, these procedures apply not only to adult convictions but also to adjudications reflecting prior "juvenile criminal behavior." App. 18a. For the purpose of calculating a defendant's offender score, state law provides that even though juvenile adjudications in Washington are not themselves subject to jury trials, *see* Wash. Rev. Code § 13.04.021(2), "adjudication" has "the same meaning as 'conviction,'" *id.* § 13.04.011(1), and thus that – absent narrow exceptions not applicable here – prior juvenile adjudications "shall always be included in the offender score," *id.* § 9.94A.525(2).

2. In 2004, the State convicted Petitioner Bounpone Sasouvong of one count of residential burglary. At sentencing, the State alleged that petitioner had prior adult felony convictions that would have dictated an offender score of seven. Under the Washington sentencing guidelines, an offender score of seven would have permitted a maximum presumptive sentence of fifty-seven months. *See* Wash. Rev.

Code § 9.94A.510. But the State also alleged that petitioner had five prior juvenile adjudications. Counting petitioner's prior juvenile adjudications as convictions – as Washington law requires – raised petitioner's offender score to ten and subjected him to a much higher presumptive range: sixty-three to eighty-four months of confinement. *Id.*

The sentencing court found the State's allegations respecting all of petitioner's criminal and adjudicative history to be true, App. 5a, and imposed a standard range sentence of seventy-five months. App. 7a. The trial court's findings respecting petitioner's alleged juvenile criminal behavior thus resulted in his sentence being increased by one and one-half years based on allegations that he has never had the chance to dispute before a jury.

3. Petitioner appealed his sentence to the Washington Court of Appeals. He argued that the lack of a jury-trial right and the rehabilitative goals of the juvenile justice system render juvenile adjudications sufficiently different from adult criminal convictions that they cannot be exempted from the *Apprendi* rule as "prior convictions." The court of appeals affirmed petitioner's sentence on the basis of *State v. Weber*, 112 P.3d 1287 (2005). App. 1a-2a. In *Weber*, the court of appeals had noted the conflicting authority regarding the constitutionality of treating nonjury prior juvenile adjudications as prior convictions but sided with those courts holding that those "juvenile adjudications that meet constitutionally-required safeguards fall within the prior conviction exception set out in *Almendarez-Torres*[, 523 U.S. 224 (1998),] and upheld in *Apprendi* and *Blakely*." *Weber*, 112 P.3d at 1294.

4. Petitioner then sought review in the Washington Supreme Court, which held the case while it conducted plenary review of the court of appeals' decision in *Weber*. On December 28, 2006, the Washington Supreme Court issued a five-to-four decision affirming the *Weber* decision. *State v. Weber*, 149 P.3d 646 (2006) (reprinted in Appendix at 8a-47a). The majority recognized that including Weber's

prior juvenile adjudications in his offender score "would undeniably increase his maximum sentence above the sentence supported by the jury's verdict" and therefore place the sentence squarely under *Apprendi*'s proscription if the exemption did not apply. App. 12a. Nonetheless, the majority held that "[i]n the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions," it would not apply the *Apprendi* rule to such adjudications. App. 18a. The majority defended this decision by reasoning that a jury trial underlying a prior conviction is only "one possible" justification for exempting the facts of such convictions from generally applicable Sixth Amendment requirements, not the "exclusive" one. App. 14a. All that is necessary, the majority concluded, is that "sufficient procedural safeguards" have existed in prior proceedings, and juvenile proceedings are sufficiently reliable to render juvenile adjudications exempt from the Sixth Amendment as a means of increasing a defendant's punishment. *Id.*

Justice Madsen authored the dissent. She argued that "[c]ases settling for a 'reliability' standard for juvenile adjudications disregard the role that the jury plays in assuring a fair decision." App. 40a. Because the "right to a jury trial is granted to criminal defendants in order to prevent oppression by the government," *id.*, there is "no substitute" for this right, App. 44a. Accordingly, Justice Madsen concluded that "in order to fall within the prior conviction exception to the rule in *Apprendi*," a juvenile adjudication must have afforded the defendant "the right to trial by jury." App. 37a.

Following its decision in *Weber*, the Washington Supreme Court denied review of *Sasouvong*'s case. App. 3a.

5. This petition followed. (A petition for certiorari has just been filed in the *Weber* case as well. *See Weber v. Washington*, No. 06-11257.)

REASONS FOR GRANTING THE WRIT

The federal courts of appeals and state supreme courts are deeply and intractably splintered over whether *Apprendi*'s exception for prior convictions extends to juvenile adjudications that were not subject to jury trials. In recent years a state government, the federal government, and individual defendants have all told this Court that this issue needs to be resolved.

This Court should do so now. The question whether juvenile adjudications may serve as a basis for increasing a defendant's sentence without the defendant ever having had the right to have a jury find that his alleged juvenile conduct warrants punishment or even actually occurred arises with great frequency. It also is outcome determinative far more often than constitutional disputes respecting prior adult criminal convictions. Finally, the Washington Supreme Court's holding that courts may unilaterally rely on such adjudications to increase defendants' sentences stretches the prior conviction exception beyond its breaking point.

A. Federal and State Courts Are Intractably Divided Over Whether Prior Nonjury Juvenile Adjudications Constitute "Prior Convictions" for Purposes of the Apprendi Rule.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 490. The *Apprendi* Court carved out the "narrow exception," *id.*, concerning prior convictions because it had decided in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that courts do not violate the Sixth Amendment by increasing defendants' sentences based on their having prior convictions. Even though the *Apprendi* Court found it "arguable that *Almendarez-Torres* was incorrectly decided," it declined to consider overruling it because "Apprendi [did]

not contest the decision's validity." *Apprendi*, 530 U.S. at 489-90. In any event, the Court found that *Almendarez-Torres* was "at best an exceptional departure from the historic practice" of presenting sentence-enhancing facts to juries and was rooted in the "unique" status of prior convictions. *Apprendi*, 530 U.S. at 487, 490. "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999).

Following the *Apprendi* decision, courts have reached conflicting decisions respecting whether prior juvenile adjudications in states that do not – as most do not – afford the right to a jury trial constitute "prior convictions" for purposes of *Apprendi*'s prior conviction exception. The Supreme Court of Washington denied review in petitioner's case pursuant to its holding in *State v. Weber*, 149 P.3d 646 (2006), that "juvenile adjudications are convictions for the purposes of *Apprendi*'s prior conviction exception." App. 19a. This holding deepened the three-way conflict over this issue among the state supreme courts and the federal courts of appeals to seven to one to two.

1. The Washington Supreme Court decision that controls this case is one of seven from state courts of last resort and federal appellate courts that have held that courts may increase defendants' sentences based on juvenile adjudications even when those adjudications were not subject to the jury trial right. In reaching this result, which the Washington Supreme Court acknowledged conflicts with decisions from other jurisdictions, the court reasoned that nonjury juvenile adjudications fall under *Apprendi*'s prior conviction exception because an underlying jury trial is only "one possible" justification for exempting factual allegations from generally applicable Sixth Amendment requirements, not the "exclusive" one. App. 14a. The court asserted that

"*Apprendi* recognized that prior convictions are excluded from the general rule because of the certainty that procedural safeguards afford them." App. 17a (quotation omitted). Because the court found the relevant juvenile proceedings "so reliable that due process of law is not offended," *id.* (quotation omitted), it found that defendants' "due process and jury trial rights are not violated" by using prior adjudications to enhance criminal sentences above the level authorized by the jury verdict, App. 19a.

The Washington Supreme Court's holding is consistent with the law of the Third, Eighth, and Eleventh Circuits, as well as the Kansas, Indiana, and Minnesota Supreme Courts. These courts similarly hold that the lack of a jury trial in juvenile proceedings does not prevent courts from increasing adult defendants' sentences based on the conduct alleged in those prior proceedings, and they focus their reasoning on the same reliability inquiry that motivated the Washington Supreme Court. *See United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002) ("[T]he question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should . . . [turn] on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption."), *cert. denied*, 537 U.S. 1114 (2003); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) ("[W]e find nothing in *Apprendi* or *Jones* . . . that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence . . . ."), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) ("Juvenile adjudications . . . provide more than sufficient safeguards to ensure the reliability that *Apprendi* requires . . . ."), *cert. denied*, 126 S. Ct. 551 (2005); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) ("The *Apprendi* Court spoke in general terms of the procedural safeguards attached to prior conviction. It did not specify *all* procedural safeguards nor did it require

certain *crucial* procedural safeguards."), *cert. denied*, 537 U.S. 1104 (2003); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) ("The main concern [in the *Apprendi* exception] was whether the prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial."), *cert. denied* 127 S. Ct. 90 (2006); *State v. McFee*, 721 N.W.2d 607, 615 (Minn. 2006) ("Absent clear direction from the United States Supreme Court, we will not upset our precedent upholding the use of juvenile criminal behavior in sentencing . . . .").

2. The Louisiana Supreme Court has reached the opposite conclusion, reasoning that the right to trial by jury does not turn on reliability and that a criminal defendant must have at least one opportunity to challenge allegations before a jury before those allegations may serve as a basis for criminal punishment. *State v. Brown*, 879 So.2d 1276 (La. 2004), *cert. denied*, 543 U.S. 1177 (2004). Consequently, a court may not increase a defendant's sentence above an otherwise binding threshold based on allegations of juvenile criminal behavior that the defendant did not have the ability to challenge before a jury.

The *Brown* court emphasized that "the history of juvenile courts illustrates why juvenile courts have fewer [procedural] safeguards." *Id.* at 1285. "Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders." *Id.* at 1286. Because of these distinctions between juvenile and criminal contexts, which still exist today, the court found that "there is a difference between a 'prior conviction' and a prior juvenile adjudication." *Id.* at 1289. "If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction . . . then the entire claim of *parens patriae* becomes a hypocritical mockery." *Id.* Because a juvenile adjudication is not "afforded *all* the

guarantees afforded adult criminals under the constitution," and "is not a conviction of any crime," *id.* at 1289, the court held that it "cannot be excepted from *Apprendi*'s general rule," *id.* at 1290.

3. The Oregon Supreme Court and Ninth Circuit have adopted something of a middle ground. In *State v. Harris*, 118 P.3d 236 (Or. 2005), the Oregon Supreme Court – like the Louisiana Supreme Court – recognized that under this Court's jurisprudence, "the jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder," *id.* at 243. "From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Id.* Thus the Oregon court specifically rejected the position first adopted by the Eighth Circuit, recognizing that this Court "has made clear that reliability is not the *sine qua non* of the Sixth Amendment; that constitutional provision also serves to divide authority between judge and jury." *Id.* at 245. It accordingly held that the "Sixth Amendment requires that when . . . an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant." *Id.* at 246.

At the same time, the Oregon Supreme Court declined to hold – as Louisiana Supreme Court did – that when a state conducts juvenile adjudications without juries, such adjudications "cannot be used to enhance adult criminal sentences unless, and until, the facts giving rise to those adjudications are presented to a jury and relitigated." *Id.* at 243. The Oregon enhancement law at issue in *Harris* did not require the state to prove to the sentencing court that the defendant actually committed the conduct alleged in a prior juvenile adjudication; it required the state to prove only the "existence" of the prior juvenile adjudication – that is, only the fact that the adjudication was indeed part of the

defendant's record. *Id.* And, according to the Oregon Supreme Court, "it is of no moment – at least for Sixth Amendment purposes – if the legislature chooses to designate, *inter alia*, a prior nonjury juvenile adjudication as an element that increases the seriousness of a crime or lengthens a criminal sentence, so long as the *existence* of that prior adjudication is proved to a jury, or such a requirement is knowingly waived." *Id.* (footnotes omitted).

In *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit likewise concluded that automatically treating juvenile adjudications as "prior convictions" under *Apprendi* "ignores the significant constitutional differences between adult convictions and juvenile adjudications," *id.* at 1192-93. The court noted that *Apprendi*'s tolerance for *Almendarez-Torres* was "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections – particularly the right to a jury trial and proof beyond a reasonable doubt." *Tighe*, 266 F.3d at 1194. The Ninth Circuit accordingly held that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial." *Id.*

Because the juvenile adjudication used in that *Tighe* to increase the defendant's sentence beyond the otherwise-applicable maximum was not subject to jury trial, the Ninth Circuit reversed the defendant's sentence and held the enhancement statute at issue (the Armed Career Criminal Act, or ACCA) unconstitutional as applied to nonjury juvenile adjudications. *Id.* Although the Ninth Circuit did not explicitly state the reach of its Sixth Amendment ruling, it suggested that if Congress amended the ACCA to allow the government to prove the existence of prior nonjuvenile adjudications to juries, then ACCA enhancements on that basis would be constitutional. *Id.* at 1195 n.5.

4. Nothing could be gained from further percolation. This conflict over the use of nonjury juvenile adjudications to enhance criminal sentences above the otherwise-authorized levels is now deeply entrenched. The Washington Supreme Court and several other courts have acknowledged the diverging lines of authority, and courts now are simply choosing sides. *See, e.g.*, App. 15a-16a, *McFee*, 721 N.W.2d at 616 n.13; *Brown*, 879 So.2d at 1283-85 (describing the early development of the split). The Ninth Circuit also repeatedly has reiterated its position, suggesting it will not reconsider it. *See United States v. Blanton*, 476 F.3d 767 (9th Cir. 2007) (applying *Tighe* without questioning its soundness); *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006) (reaffirming that "we do not recognize nonjury juvenile adjudications as 'convictions' falling within the *Apprendi* exception"), *cert. denied*, 127 S. Ct. ___ (May 14, 2007); *United States v. Washington*, 462 F.3d 1124, 1141-42 (9th Cir. 2006) (same). Courts' disparate treatment of defendants – sometimes within the same jurisdiction depending only on whether a case is proceeding in state or federal court – will persist (and likely worsen) until this Court steps in.

B. The Constitutional Question Presented Is Extremely Important to the Sound Administration of Criminal Justice.

Parties on every side of this issue have urged this Court to resolve the ever-deepening conflict among the federal circuits and state supreme courts over whether nonjury juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* doctrine. A state government, *see* Petition for Writ of Certiorari, *Louisiana v. Brown* (No. 04-770), and the federal government, *see* Brief for the United States, *Smalley v. United States* (No. 02-6693), have recognized the "circuit conflict on that issue" and agree that "this Court's review is warranted," *id.* at 8. Petitioner too urges this Court to take review in order to delineate the scope of criminal defendants' jury trial rights relating to sentencing

based upon prior juvenile adjudications. The issue is one that continually recurs and that generates large differences in the duration and severity of sentences for criminal defendants. It also is one that implicates constitutional protections of "surpassing importance." *Apprendi*, 530 U.S. at 476.

1. Thirty-seven states, including Washington, do not allow juveniles accused of criminal behavior to challenge those accusations before juries.[1] While it is difficult to estimate how many adult defendants' sentences in these states are increased above otherwise binding thresholds because courts find that they committed prior criminal offenses as juveniles in one of these states, the number is undeniably extremely large. For starters, it seems clear that a significant proportion of adult convicted defendants have prior records of juvenile adjudications. At the time of a 1996 survey, five states maintained databases that permitted an analysis of juvenile adjudications among convicted adult defendants. The survey found that the proportion of convicted defendants reported to have juvenile adjudication records was 8% in Washington state, 11.2% in Michigan, 6% in Pennsylvania, 9% in Minnesota, and 5.4% in Oregon. Institute for Law and Justice, *Prosecutor and Criminal Court Use of Juvenile Court Records: A National Study* 5 (Aug. 1996), *available at* http://www.ilj.org/publications/juvenile_records.pdf.

For such defendants, a finding that they engaged in criminal behavior as juveniles can make an enormous difference in the length of the sentence that courts may impose. Having a record of prior juvenile adjudications

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[1] Stephen F. Donahoe, *The Problem with Forgiving (but Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. PITT. L. REV. 887, 904 n.109 (2005). In states that grant juveniles the right to trial by jury, the question presented does not arise because the prior adjudication itself was established subject to the jury trial guarantee. *See, e.g., State v. Greist*, 121 P.3d 811, 813-15 (Alaska App. 2005).

allows a court to increase an adult defendant's sentence by over forty years in eleven states, by twenty to forty years in six states, and by one to twenty years in seven states. Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 21 (2000).

The impact of a judicial finding that a defendant has a record of juvenile adjudications can be particularly serious in states with three-strikes laws or similar offender-points-based enhancements. California, Louisiana, and Texas each have three-strikes laws under which juvenile adjudications may count for all but the final strike. Under these laws, a judicial finding respecting a defendant's juvenile adjudication can spell the difference between a term of a few years and a life sentence for his first adult conviction. *See, e.g.*, *People v. Lee*, 111 Cal. App. 4th 1310 (Cal. Ct. App. 2003) (upholding the use of a prior juvenile adjudication as one strike under the California three-strikes law); Sanborn, *supra*, at 24. Florida uses a points-based approach that is essentially a more nuanced version of California's three-strikes law; again, juvenile adjudications can serve as all but the final strike. *See, e.g.*, *McCullough v. Singletary*, 967 F.2d 530 (11th Cir. 1992) (upholding the use of defendant's juvenile adjudication record to enhance a burglary and sexual assault conviction into a life sentence). In numerous other states, such as Washington, courts' findings that adult defendants committed criminal conduct as juveniles routinely expose defendants to several months or years of extra prison time.

2. The question whether juvenile criminal conduct must be proved to a jury beyond a reasonable doubt before it may be used to enhance a defendant's sentence is often outcome determinative. In *Rangel-Reyes v. United States*, 126 S. Ct. 2873 (2006), Justice Stevens noted that there was no pressing need for this Court to reconsider the adult prior conviction exception of *Almendarez-Torres* itself because "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create

any significant risk of prejudice to the accused." *Id.* at 2873 (Stevens, J., respecting the denial of certiorari). That is, because the accused facing heightened punishment based on prior convictions already had the opportunity to challenge the factual allegations underlying the convictions before a jury, the defendant would be able in the current trial to challenge only whether the prior conviction that the prosecution alleges actually exists and whether he was actually the person convicted.

But that is manifestly *not* the case with respect to juvenile adjudications. As the Louisiana Supreme Court has recognized, the Sixth Amendment requires that a defendant have at least one opportunity to dispute before a jury a state's allegations that subject him to heightened punishment. Accordingly, a court may not increase an adult defendant's sentence beyond an otherwise binding threshold based on prior juvenile conduct that was not subject to a jury trial unless the defendant has the right to put the state to its proof regarding the underlying conduct before a jury in the current proceeding. That prosecutorial burden is qualitatively different – both more comprehensive and more onerous – than simply proving the mere existence of the prior adjudication. And if the enhancement law at issue does not provide a procedural mechanism for relitigating those underlying accusations before a jury, it is unconstitutional. *Brown*, 879 So.2d at 1290.

Even if the Oregon Supreme Court and the Ninth Circuit were correct that the Sixth Amendment entitles a defendant to dispute at least the *existence* of a prior nonjury juvenile adjudication (but not the allegations underlying the adjudication) before the current jury, this rule would still affect far more cases than overruling *Almendarez-Torres* would. The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). This power, as Judge Friendly

explained, gives juries the authority to issue verdicts "in the teeth of both law and facts . . . to prevent punishment from getting too far out of line with the crime." *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960); *see also Apprendi*, 530 U.S. at 579 n.5 (juries historically have "devised extralegal ways of avoiding . . . the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct"). Therefore, even if sentence-enhancement laws provided a means of proving the existence of nonjury adjudications to juries and juries found record-keeping with respect to juvenile adjudications as reliable as with respect to adult convictions, it seems far more plausible that juries would use their constitutionally mandated mitigating authority to prevent judges from increasing defendants' punishments based on the existence of prior juvenile adjudications than based on prior adult criminal convictions. Adult defendants may have committed the conduct underlying juvenile adjudications long ago and, by definition, the conduct was "'not as morally reprehensible as that of an adult.'" *Roper v. Simmons*, 543 U.S. 551, 570 (2006) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Juvenile defendants may even have declined to challenge contestable accusations because stipulating to the state's charges subjected them to rehabilitative services and not to punishment. Juries may perceive it as unfair to punish defendants for having declined to struggle against the state's attempts to act in their best interests as *parens patrie*.

3. In contrast to the persisting controversy over using prior convictions to increase defendants' sentences, the uncertainty over whether courts may use nonjury juvenile adjudications to increase defendants' sentences is generating disparate treatment that will not cease until this Court acts. Instead of allowing the government to prove the existence of nonjury juvenile adjudications to juries, district courts in the Ninth Circuit are now granting acquittals when the govern-

ment seeks enhancements based on such adjudications, and these acquittals are not subject to appellate review. *See Blanton*, 476 F.3d at 772. Unless and until this Court resolves the question presented, federal defendants in the Ninth Circuit who are prosecuted under the Armed Career Criminal Act will be subject to vastly different punishment than will defendants in other circuits.

C. The Washington Supreme Court's Holding that Nonjury Juvenile Adjudications Constitute "Prior Convictions" for Purposes of the *Apprendi* Rule Is Wrong on the Merits.

This Court's Sixth Amendment jurisprudence dictates that a judge may not constitutionally use prior juvenile adjudications that were not themselves subject to a jury trial to increase a defendant's sentence beyond the level otherwise permitted.

Apprendi's prior-conviction exception derives from this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), in which this Court held that a court may increase a defendant's sentence beyond an otherwise binding statutory limit based on the fact that the defendant has previously been convicted of a crime, *id.* at 243-44.[2] The following Term, however, this Court made clear that the judicial factfinding that *Almendarez-Torres* allows is a limited exception – and not the rule – concerning the right to trial by jury. "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial

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[2] This Court need not reconsider its holding in *Almendarez-Torres* in order to resolve the question at issue here. But to the extent that this Court wishes to use this case as a vehicle for reconsidering *Almendarez-Torres*, the validity of that decision could be considered "fairly encompassed" within the question presented. *See* Supreme Court Rule 21.1(a).

guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999).

It was against this background that this Court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "confirm[ed] the opinion that [it] expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 490. Again, this Court emphasized that the prior conviction exception is "narrow" and that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the required fact." *Id.* at 490, 496.

To state what should be obvious, a juvenile adjudication in which the defendant did not have the right to a jury trial is not, in *Apprendi*'s words, "a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial." *Id.* at 496. Nonjury juvenile adjudications thus do not satisfy a prerequisite for the prior conviction exception – namely, that the defendant already have had one opportunity to dispute the state's allegations before a jury.

But even apart from the empty jury box in juvenile proceedings, a juvenile adjudication is not even a "conviction" of any crime. It is a finding of civil delinquency that allows the state to require the juvenile to undergo rehabilitative treatment. Accordingly, this Court has made clear that a court's role in a modern, nonjury juvenile proceeding is "*not* to ascertain whether the child [is] 'guilty' or 'innocent'" but rather to determine whether the child needs the state's "care and solicitude." *In re Gault*, 387 U.S. 1, 15 (1967) (emphasis added); *see also Brown*, 879 So.2d at 1286-89. The *Gault* principle is not only desirable but necessary: If modern juvenile proceedings lost this "intimate, informal protective" focus, their dispensing with juries would be unconstitutional, for they would directly constitute

"criminal proceedings" covered by the Sixth Amendment's Jury Clause. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-50 (1971).[3]

It is no answer to say that *Apprendi*'s prior conviction exception should nonetheless be extended to include juvenile adjudications because such adjudications "are so reliable that due process of law is not offended." App. 17a (*State v. Weber*, 149 P.3d 646, 652 (Wash. 2006) (quoting *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002))). Due process reliability is beside the point. We are concerned here with the procedural right to trial by jury. And "the jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Harris*, 118 P.3d at 243; *see also Blakely*, 542 U.S. at 306 ("jury trial is meant to ensure [the people's] control in the judiciary"); *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004) (Framers installed jury trial right because of the jury's perceived independence, not any factfinding accuracy). A court may no more "dispens[e] with jury trial because the defendant is obviously guilty," *Crawford v. Washington*, 541 U.S. 36, 62 (2004), than it may

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[3] It is true that recent changes to Washington juvenile law – and to juvenile proceedings throughout the country – have somewhat modified that law's focus and "imposed more traditional criminal punishment following an adjudication of guilt." App. 18a. But juveniles accused of criminal behavior in Washington still have no right to a trial by jury, *see* Wash. Rev. Code § 13.40.140, and the constitutionality of that state of affairs under *McKeiver* depends on the continuing reality of the "unique rehabilitative nature of juvenile proceedings." *State v. Tai N.*, 113 P.3d 19, 22 (Wash. App. 2005) (reaffirming constitutionality of juvenile sentencing system) (internal quotation omitted); *see also* App. 42a (Madsen, J., dissenting) (noting that juvenile proceedings in Washington "are still demonstrably different, with different emphases and different consequences, than those from the criminal context").

dispense with the jury trial right with respect to a sentence enhancement because the state's proffered support for the enhancement is obviously reliable.

To reject this conclusion, one must accept one of two alternatives. The first is that a legislature may choose to label *any* past determination of wrongdoing at all a "conviction" – thereby allowing a judge to enhance a defendant's sentence on the basis of its existence – so long as the past determination is "reliable" for due process purposes. Under this view, states could allow courts unilaterally to enhance sentences based on the results of all sorts of prior proceedings that are not subject to jury trials. States, for example, could allow courts to impose heightened punishment based on prior convictions for crimes that carry a maximum prison term of fewer than six months, even though defendants generally have no constitutional right to jury trials respecting such charges. *See Baldwin v. New York*, 399 U.S. 66, 68-69 (1970); *Blanton v. North Las Vegas*, 489 U.S. 538, 542-43 (1989). States might also allow heightened punishment – again, without any jury involvement whatsoever – based on convictions in foreign countries that do not provide a right to jury trial, *see United States v. Kortgaard*, 425 F.3d 602, 610 (9th Cir. 2006) (confronting such an enhancement but finding it unconstitutional on other grounds), or even based on courts' determinations respecting prior administrative findings of wrongdoing, such as immigration violations, school suspensions, or employment disciplinary measures. *See, e.g., United States v. Covian-Sandoval*, 462 F.3d 1090, 1097-98 (9th Cir. 2006) (applying *Tighe* to preclude judicial sentence-enhancing findings respecting deportation orders), *cert. denied*, 127 S. Ct. 1866 (2007). So permissive a view of *Apprendi*'s prior conviction exception would make a mockery of this Court's insistence in *Jones* that "a prior conviction must itself have been established through procedures satisfying the fair notice,

reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999).

The other alternative is that legislatures may label past findings as "convictions" within limits that are crossed when the legislature strays *too far* from what looks like a criminal conviction. Under this view, criminal and quasi-criminal adjudications that lack the jury trial guarantee would qualify as "prior convictions" for Sixth Amendment purposes, but purely civil and administrative proceedings might not. But as this Court held in *Blakely* with respect to a similar "too far" argument:

> Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is too far. . . . [T]hat claim [is] not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

542 U.S. at 308.

The simple rule should be that if a legislature refuses to equip a hearing (be it labeled criminal or adjudicatory) with all of the protections that the Constitution guarantees to criminal defendants, including trial by jury, it cannot later call an adverse outcome a "conviction" for the purpose of the *Apprendi* prior conviction exception. Here, no jury has ever found that the state may punish petitioner for the conduct alleged in his prior juvenile adjudications. Accordingly, the trial court violated the Sixth Amendment by increasing his sentence on that basis.

D. This Case Is an Ideal Vehicle for Resolving the Question Presented.

Three aspects of this case make it a perfect vehicle for resolving whether nonjury prior juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* rule.

1. Procedurally, this case is on direct review from a final judgment affirming petitioner's conviction and sentence. Petitioner also timely raised the federal constitutional issue presented here, and the Washington Court of Appeals considered the issue entirely on the merits. App. 1a-2a. Consequently, no retroactivity or jurisdictional concerns come into play.

2. The question presented is unquestionably outcome determinative. The highest sentence petitioner could have received based on his crime of conviction and his prior adult convictions was fifty-seven months. *See supra* at 3-4. Yet the trial court imposed a sentence of seventy-five months based on its finding that petitioner had violated criminal statutes as a juvenile. The legitimacy of this one-and one-half year increase in petitioner's sentence thus stands or falls according to whether the Sixth Amendment permitted the trial court to make those findings with respect to petitioner's juvenile behavior.

3. Finally, this case – unlike others that have presented this issue to this Court – arises in the context of an underlying sentencing law that affords this Court the opportunity to choose among the three competing positions that various federal and state courts have adopted with respect to this issue. The Washington Supreme Court stated in *Weber* that "[its] State's system anticipates that individuals who are not rehabilitated and who reoffend as adults may be punished in a manner that considers their preceding juvenile criminal behavior." App. 18a. Thus, to the extent that the Oregon Supreme Court is correct that the Sixth Amendment allows state law to condition an increase sentencing range on the

mere *existence* of a prior juvenile adjudication – regardless of whether the current factfinder actually believes that the defendant actually committed the wrongful behavior underlying the adjudication – Washington law requires the State to establish more than merely "the fact that a juvenile adjudication *occurred*." App. 19a n.5. Washington law, as authoritatively explicated by the Washington Supreme Court, contemplates an increased sentence only if the court finds that the defendant's underlying "behavior" as a juvenile was criminal in nature. App. 18a. Accordingly, this Court clearly could hold – as the defendant in *Weber* urged, *id.*, and as petitioner urges – that the Sixth Amendment under these circumstances requires proof to the current jury that the defendant's alleged juvenile behavior in fact violated the criminal statute at issue. Alternatively, the Court could hold – along the lines of the Oregon Supreme Court – that the Sixth Amendment allows defendants to contest before the current jury at least whether they were involved in the prior juvenile adjudications the State alleges. Either way, this Court would be compelled to conclude that the one and one-half year increase to petitioner's sentence was unconstitutionally imposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 17, 2007

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 54422-5-I
Respondent/	)	
Cross-Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
BOUNPONE B. SASOUVONG,	)	UNPUBLISHED
	)	OPINION
	)	
Appellant/	)	
Cross-Respondent.	)	FILED: Sept. 26, 2005

PER CURIAM – Bounpone B. Sasouvong appeals the sentenced imposed following his conviction for residential burglary.[1] He contends his rights to due process and a trial by jury were violated by the inclusion of five prior juvenile convictions in his offender score.

In *State v. Weber*, 127 Wn. App. 879, 112 P.3d 1287 (2005), we rejected the arguments raised in this appeal. *See also State v. Tai N.*, 127 Wn. App. 733, 113 P.3d 19 (2005). Sasouvong's challenge to his sentence on this ground fails.

In his statement of additional grounds for review, Sasouvong relies on *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002), to challenge the calculation of his offender score. The sentencing court calculated his offender score as 10, including five juvenile convictions and two felony convictions that dated from after he was found guilty of this offense but before he was

[1] The State has withdrawn its cross-appeal.

sentenced. Sasouvong failed to appear at his initial sentencing hearing and was convicted of the two felonies before he was sentenced in this case. These felony convictions are not listed in the judgment and sentence, but they were addressed at Sasouvong's sentencing; he was sentenced for one of them, possession of cocaine, at the same hearing. Sasouvong is correct that the convictions listed on the judgment and sentence compute to 8 1/2 points. But his counsel acknowledged at sentencing that he had "accrued two more criminal convictions" since his original sentencing date. Report of Proceedings (June 7, 2004) at 108. He cannot claim now that there was insufficient proof of his criminal history to warrant the calculation of his offender score as 10. *State v. Ford*, 137 Wn.2d 472, 483 n. 5, 973 P.2d 452 (2002).

We affirm.

For the Court:

Cox, C.J.
Baker, J.
Schindler, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 77926-1
Respondent,	)	
	)	ORDER
v.	)	
	)	C/A NO. 54422-5-I
BOUNPONE B. SASOUVONG,	)	
	)	
	)	
Petitioner	)	
	)	

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J.M. Johnson (Justice Chambers sat for Justice Bridge), considered this matter at its April 4, 2007, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of April, 2007.

For the Court

Gerry L. Alexander
Chief Justice

APPENDIX C

FILED
2004 JUN-8 PM 3:49

PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON,	
	No. 02-1-00952-7
Plaintiff,	
	JUDGMENT AND
v.	SENTENCE
	C/A NO. 54422-5-I
SASOUVONG, BOUNPONE B.	
	[X] Prison
	[ ] Jail One Year or Less
Defendant.	* * *

I. HEARING

1.1 A sentencing hearing was heald and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on May 20, 2003 by jury-verdict of:

COUNT	CRIME	RCW	INCIDENT #	DATE
I	Residential Burglary	9A.52.025	LYN, 02020790	3/12/02

As charged in the Information.

* * *

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

CRIME	DATE OF SENTENCE	SENT. COURT	ADULT, JUV.	TYPE OF CRIME
1. Residential Burglary	12/08/95	King/WA	Adult	Class B
2. Take Motor Vehicle Without Permission	12/08/95	King/WA	Adult	Class C
3. Second Degree Possession of Stolen Property	07/24/98	King/WA	Adult	Class C
4. Attempt to Elude Pursuing Police	07/24/98	King/WA	Adult	Class C
5. Take Motor Vehicle Without Permission	01/29/93	Snohomish/WA	Juvenile	Class C
6. Take Motor Vehicle Without Permission	03/16/93	Snohomish/WA	Juvenile	Class C
7. Take Motor Vehicle Without Permission	03/15/94	King/WA	Juvenile	Class C
8. Residential Burglary (2 counts)				

03/15/94 King/WA Juvenile Class B

* * *

2.3 SENTENCING DATA:

COUNT NO.	1
OFFENDER SCORE	10
SERIOUS. LEVEL	IV
STANDARD RANGE (not including enhancements)	63-84 months
PLUS ENHANCEMENTS	N/A
TOTAL STANDARD RANGE (including enhancements)	63 to 84 months
MAXIMUM TERM	10 yrs/$20,000

* * *

2.6 The prosecutor's recommendation was 75 months/days on Count 1 . . . .

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

* * *

IV. SENTENCE AND ORDER

* * *

4.5 CONFINEMENT OVER ONE YEAR

CONFINEMENT [Determinate Sentences]. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

75 months on Count I

* * *

The maximum term of total confinement ordered on all counts cumulatively is 75 months.

* * *

DONE in Open Court and in the presence of the defendant this date: June 7, 2004.

JUDGE Larry McKeeman

RANDALL W. YATES #8305
Deputy Prosecuting Attorney

ANN C. FROST, # 30414
Attorney for Defendant

BOUNPONE B. SASOUVONG
Defendant

* * * *

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 77395-5
Respondent,	)	
	)	En Banc
v.	)	
	)	
CHARLES WALTER WEBER,	)	
	)	
	)	
Petitioner	)	Filed Dec. 28, 2006
	)	

FAIRHURST, J. – [¶1] A jury convicted petitioner Charles Walter Weber of first degree assault and second degree attempted murder stemming from the same shooting incident. Weber argues that the inclusion of his prior juvenile adjudications in his offender score during sentencing violates his due process rights and his right to a jury trial. He also argues that the Court of Appeals erred by vacating his second degree attempted murder conviction rather than his first degree assault conviction as the lesser offense for double jeopardy purposes. Finally, he argues that the prosecuting attorney committed three instances of misconduct requiring reversal of his convictions.

[¶2] We hold that prior juvenile adjudications fall under the "prior conviction" exception in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and are not facts that a jury must find under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). We also hold that, in this case, the lesser offense for double jeopardy purposes is the offense that carries the lesser

sentence, which was Weber's attempted murder conviction. Finally, we hold that the prosecuting attorney did not commit misconduct that constitutes reversible error. We affirm the Court of Appeals.

I. FACTUAL AND PROCEDURAL HISTORY

[¶3] In the early morning of March 18, 2003, Weber was at a friend's apartment with several people drinking beer. Weber and his friend, Nick Renion, started to argue with Gabriel Manzo-Vasquez (Manzo). During the argument, Weber pulled a gun on Manzo. Manzo escaped the apartment by jumping out of a bedroom window and ran to his vehicle. Weber followed Manzo outside and fired multiple shots at Manzo's vehicle. One of the bullets grazed Manzo's side, causing a slight injury.

[¶4] When the police investigated the incident, Manzo told them that a man he knew as "Guero Loco" shot him. Verbatim Report of Proceedings (VRP) (June 17, 2003) at 39; VRP (June 19, 2003) at 25-26. "Guero Loco" translates as "crazy white guy" in English. VRP (June 17, 2003) at 41. Manzo provided the police with a physical description of Weber, including a description of the distinctive tattoo of "206" on the back of his neck. *Id.* at 39. Manzo identified Weber in a photo montage with 80 percent certainty and stated that he could be only 80 percent certain because he could not see the blacked out tattoo. At trial, Manzo identified Weber as his shooter and confirmed that he had the correct tattoo.

[¶5] In a pretrial hearing, the trial court excluded testimony by Detective George Alvarez that he had previously met Weber specifically while investigating a crime involving Weber's brother but did not exclude evidence that the detective had previously met Weber. The trial court also excluded any evidence of gang membership but did not exclude evidence of "any marks that may have been observed by any witness or testimony of any marks that

may currently be present on Mr. Webber [sic]." VRP (June 11, 2003) at 10. The State concedes that the prosecuting attorney committed misconduct by eliciting evidence covered by the motions to exclude and by making an improper argument in rebuttal closing argument but argues that the misconduct did not affect the outcome of Weber's trial. Br. of Resp't at 11, 15, 17.

[¶6] The prosecuting attorney charged Weber with first degree attempted murder with a firearm, first degree assault with a firearm, first degree unlawful possession of a firearm, and possession of cocaine with intent to manufacture or deliver. Weber pleaded guilty to possession of cocaine with intent to deliver. A jury acquitted Weber of first degree attempted murder and instead found him guilty of second degree attempted murder with a firearm, as well as first degree assault with a firearm and first degree unlawful possession of a firearm.

[¶7] At sentencing, the trial court declined to include Weber's prior juvenile adjudication for first degree attempted robbery in his offender score because it had "washed out" under a previous version of the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW. VRP (Aug. 8, 2003) at 15; Clerk's Papers (CP) at 171. The trial court also noted that Weber's other juvenile adjudication, for taking a motor vehicle without permission, was only "half a point" and did not factor into his offender score. VRP (Aug. 8, 2003) at 16. The trial court found that Weber's convictions for attempted murder and assault constituted double jeopardy and vacated the assault conviction as the lesser offense.

[¶8] Weber appealed his convictions to the Court of Appeals, arguing that three instances of prosecutorial misconduct constituted reversible error. Br. of Appellant at 8-14. The State filed a cross appeal challenging the trial court's decision to vacate Weber's assault conviction as the lesser offense and the trial court's finding that Weber's juvenile attempted robbery adjudication "washed out." Br. of Resp't at 43-51. Weber replied that the inclusion of his prior

juvenile adjudications in his offender score would violate his due process rights under the Fifth and Fourteenth Amendments and his right to a jury trial under the Sixth Amendment. Reply Br. of Appellant at 2-12.

[¶9] In a partially published opinion, the Court of Appeals held that Weber's prior juvenile adjudication did not wash out and should have been included in his offender score. *State v. Weber*, No. 52911-1-I, slip op. (unpublished portion) at 25 (Wash. Ct.App. June 6, 2005). In so holding, the court concluded that juvenile adjudications fall under the prior conviction exception in *Apprendi* and that Weber's juvenile adjudications were "properly considered to calculate his offender score." *State v. Weber*, 127 Wash. App. 879, 892-93, ¶ 32, 112 P.3d 1287 (2005). The court reversed the trial court and vacated the attempted murder conviction as the lesser offense for double jeopardy purposes, and reinstated Weber's assault conviction. *Id.* at 882, ¶ 3, 112 P.3d 1287. Finally, the court held that although the prosecuting attorney committed misconduct, that misconduct did not constitute reversible error. *Weber*, slip op. (unpublished portion) at 15-22. We granted Weber's subsequent petition for review on all three issues. *State v. Weber*, 156 Wash.2d 1010, 132 P.3d 147 (2006).

II. ISSUES

A. Whether, under *Apprendi*'s prior conviction exception, a trial court may include prior juvenile adjudications in an offender score calculation.

B. Whether second degree attempted murder or first degree assault is the "lesser" offense for double jeopardy purposes.

C. Whether prosecutorial misconduct caused Weber prejudice requiring reversal of his convictions.

III. ANALYSIS

A. Whether, under *Apprendi*'s prior conviction exception, a trial court may include prior juvenile adjudications in an offender score calculation

[¶10] Weber argues that the trial court's inclusion of his prior juvenile adjudications in his offender score violates his due process rights under the fifth and fourteenth amendments,[1] and his jury trial rights under the sixth amendment[2] to the United States Constitution. In *Apprendi*, the United States Supreme Court held that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. 2348 (emphasis added). In *Blakely*, the Court clarified that the relevant "statutory maximum" for *Apprendi* purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303, 124 S. Ct. 2531. In other words, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04, 124 S. Ct. 2531.

[¶11] Inclusion of Weber's juvenile adjudications in his offender score would undeniably increase his maximum sentence above the sentence supported by the jury's verdict. However, under *Apprendi*, only facts "[o]ther than the fact of

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[1] The Fifth Amendment provides, in relevant part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment provides, in relevant part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[2] The Sixth Amendment guarantees a criminal defendant the right to "a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI.

a prior conviction" that increase a defendant's maximum sentence violate that defendant's constitutional rights. 530 U.S. at 490, 120 S. Ct. 2348. Thus, we must consider whether Weber's juvenile adjudications qualify as "prior convictions" under *Apprendi*'s prior conviction exception.

[¶12] The United States Supreme Court first carved out an exception for prior convictions in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998). The Court held that recidivism is not a fact that a jury must find in order for a defendant's prior conviction to be used to enhance his or her sentence.

> [T]he sentencing factor at issue here--recidivism--is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. . .. [T]o hold that the Constitution requires that recidivism be deemed an "element" of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as "go[ing] to the punishment only."

Id. at 243-44, 118 S. Ct. 1219 (fourth alteration in original) (citations omitted) (quoting *Graham v. West Virginia*, 224 U.S. 616, 629, 32 S. Ct. 583, 56 L.Ed. 917 (1912)). In *Apprendi*, the Court again recognized an exception for prior convictions based on *Almendarez-Torres* and observed that:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

530 U.S. at 488, 120 S. Ct. 2348. Thus, the *Apprendi* Court reasoned that when prior convictions are used to increase a defendant's punishment above the statutory maximum sentence, a jury need not find those facts because they already carry sufficient procedural safeguards.

[¶13] As in *Almendarez-Torres*, Weber does not challenge the "fact" of his juvenile adjudication, but he does argue that

a juvenile adjudication does not carry the same procedural safeguards as a prior conviction.[3] Weber argues that the Supreme Court's decision in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999), clarifies that the prior conviction exemption in *Almendarez-Torres* was predicated on the right to a jury trial. Because juvenile adjudications do not carry the right to a jury trial, Weber argues that they do not fall under the prior conviction exception. The dissent agrees that *Jones* is the key to understanding *Apprendi*'s prior conviction exception because *Jones* explains why "it was permissible, in *Almendarez-Torres v. United States*, to use a prior conviction as a sentencing factor to increase a statutorily mandated maximum punishment." Dissent at 661 (citation omitted).

[¶14] The *Jones* Court, after noting the "emphasis on the distinctive significance of recidivism" in *Almendarez-Torres*, stated:

> *One basis for that possible constitutional distinctiveness is not hard to see*: unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

526 U.S. at 249, 119 S. Ct. 1215 (emphasis added). *Jones* thus advances the guaranties of "fair notice, reasonable doubt, and jury trial" as one possible, not the exclusive, basis for the distinctive constitutional treatment of recidivism. *Id.* The dissent concludes that to fall within *Apprendi*'s prior conviction exception "a juvenile adjudication *must* have had

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[3] Weber's juvenile adjudication for attempted first degree robbery was an element of the charge of unlawful possession of a firearm in the first degree, one of his convictions. VRP (June 30, 2003) at 7; CP at 35. Weber stipulated to the existence of this prior adjudication but later argued that it "washed out." CP at 157-58. The Court of Appeals held that the adjudication did not wash out. *Weber*, slip op. (unpublished portion) at 24-25. Weber has never argued that his prior adjudication was invalid.

the same constitutional safeguards in place as in *Jones*, in particular the right to trial by jury and proof beyond a reasonable doubt." Dissent at 661 (emphasis added). However, *Jones* did not authoritatively pronounce that "fair notice, reasonable doubt, and jury trial" represented the minimal procedural safeguards sufficient for the prior conviction exception announced in *Apprendi* the following year.

[¶15] The United States Court of Appeals for the Ninth Circuit has held that juvenile adjudications may not be used to enhance a sentence without violating a defendant's constitutional rights.

> Thus, as we read *Jones* and *Apprendi*, the "prior conviction" exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*'s "prior conviction" exception.

United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir.2001). Other jurisdictions have also held that juvenile adjudications do not fall within Apprendi's prior conviction exception. *See, e.g., State v. Brown*, 03-2788 (La.7/06/04), 879 So.2d 1276, 1289 (holding that juvenile adjudications are not convictions for the purposes of the prior conviction exception), *cert. denied*, 543 U.S. 1177, 125 S. Ct. 1310, 161 L.Ed.2d 161 (2005); *State v. Harris*, 339 Or. 157, 172-75, 118 P.3d 236 (2005) (holding that juvenile adjudications are not convictions under Oregon law and may not be used as sentence enhancement factors unless admitted by the defendant or proven to a jury).

[¶16] However, the majority of jurisdictions that have considered this issue have reached the opposite conclusion and held that juvenile adjudications fall under the prior conviction exception. *See, e.g., United States v. Jones*, 332 F.3d 688, 696 (3d Cir.2003) (juvenile proceedings provide

sufficient procedural safeguards to qualify under the prior conviction exception), *cert. denied*, 540 U.S. 1150, 124 S. Ct. 1145, 157 L.Ed.2d 1044 (2004); *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir.2002) (juvenile adjudications are prior convictions for *Apprendi* purposes); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir.) (holding, based on *Jones* and *Smalley*, that juvenile adjudications provide sufficient procedural safeguards to qualify as prior conviction), *cert. denied*, --- U.S. ----, 126 S. Ct. 551, 163 L.Ed.2d 467 (2005); *People v. Superior Court*, 113 Cal.App.4th 817, 834, 7 Cal.Rptr.3d 74 (2003) (juvenile adjudications may be used as a "strike" for the purposes of a "three strikes" law), *cert. denied sub nom. Andrades v. California*, 543 U.S. 884, 125 S. Ct. 121, 160 L.Ed.2d 142 (2004); *Nichols v. State*, 910 So.2d 863, 864-65 (Fla.Dist.Ct.App.2005) (juvenile adjudications may be included in a defendant's "scoresheet" unless he or she can prove they are "constitutionally infirm"); *State v. Hitt*, 273 Kan. 224, 236, 42 P.3d 732 (2002) (juvenile adjudications "are included within the historical cloak of recidivism"); *Ryle v. Indiana*, 842 N.E.2d 320 (Ind.2005) (juvenile adjudications may be used to enhance a sentence), *cert. denied*, --- U.S. ----, 127 S. Ct. 90, 166 L.Ed.2d 63 (2006).

[¶17] Weber argues that our decision in *State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, --- U.S. ----, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006), dictates that this court recognize that the prior conviction exception is based only on convictions found by a jury. In *Hughes*, we observed that the reason for the prior conviction exception "likely is because of the objective nature and the inherent protections associated with the existence of prior convictions--the defendant already had the facts regarding his prior conviction found by a jury beyond a reasonable doubt." *Id.* at 137 n. 5, 110 P.3d 192. However, as in *Apprendi*, the *Hughes* court did not specifically consider whether the protections associated with

juvenile adjudications would also qualify them under the prior conviction exception.

[¶18] As the United States Court of Appeals for the Eighth Circuit noted in *Smalley*, *Apprendi* recognized "that prior convictions are excluded from the general rule because of the 'certainty that procedural safeguards,'" afford them. *Smalley*, 294 F.3d at 1032 (quoting *Apprendi*, 530 U.S. at 488, 120 S. Ct. 2348). However, the *Apprendi* court did not specifically identify a jury trial as being a required procedural safeguard. As the Eighth Circuit observed:

> [W]hile the Court [in *Apprendi*] established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles.

Smalley, 294 F.3d at 1032. As a result, the *Smalley* court concluded that:

> [T]he question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption. We believe that they are.

Id. at 1032-33.

[¶19] The State argues that juvenile adjudications carry sufficient procedural safeguards to qualify them as prior convictions under the *Apprendi* exception. Washington courts have a long history of considering juvenile adjudications in sentencing hearings. In *State v. Dainard*, 85 Wash.2d 624, 627-28, 537 P.2d 760 (1975), this court held that a trial court may consider an adult defendant's juvenile record in a sentencing hearing. The legislature has dictated that juvenile adjudications may be included in an adult offender's criminal history and, in some circumstances, that a court may score juvenile adjudications as equivalent to adult offenses. RCW 9.94A.030(14); RCW 9.94A.525(8), (9),

(16). Finally, the Juvenile Justice Act of 1977 (JJA), chapter 13.40 RCW, specifically mandates numerous safeguards for juvenile adjudications, such as the right to notice, counsel, discovery, an opportunity to be heard, confrontation of witnesses, and an unbiased fact finder. RCW 13.40.140.[4]

[¶20] Despite the evidence of the reliability of and the historical reliance on juvenile adjudications, Weber maintains that juvenile adjudications do not fall under the *Apprendi* exception because they are not convictions. Weber argues that the focus of the juvenile justice system "is on rehabilitation rather than assigning criminal responsibility and punishment." Pet. for Review at 10 (citing *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967); *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L.Ed.2d 84 (1966); *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L.Ed.2d 647 (1971)). However, as Weber himself notes, "[s]ubsequent amendments to the JJA have altered the statute's focus and imposed more traditional criminal punishment following an adjudication of guilt." Suppl. Br. of Pet'r at 14 n. 15. A 1997 amendment to the JJA provides, "'[a]djudication' has the same meaning as 'conviction' in RCW 9.94A.030, and the terms must be construed identically and used interchangeably." RCW 13.04.011(1).

[¶21] While a goal of juvenile adjudication is rehabilitation, our State's system anticipates that individuals who are not rehabilitated and who reoffend as adults may be punished in a manner that considers their preceding juvenile criminal behavior. In the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions, and in light of the aforementioned

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[4] Weber argues that juvenile adjudications are less reliable than adult convictions. Pet. for Review at 12-14; Suppl. Br. of Pet'r at 16- 17. However, Weber does not provide any proof that juvenile adjudications are less reliable, nor does he specifically analyze juvenile proceedings in Washington. Additionally, this argument does not refute the long-standing policy of the legislature and Washington courts to utilize juvenile adjudications in sentencing.

strong state indicators, we hold that juvenile adjudications are convictions for the purposes of *Apprendi*'s prior conviction exception. Therefore, we affirm the Court of Appeals determination that Weber's due process and jury trial rights are not violated by including Weber's juvenile adjudication in his offender score.[5]

B. Whether second degree attempted murder or first degree assault is the "lesser" offense for double jeopardy purposes

[¶22] The United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Washington Constitution provides that no person shall "be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. "The federal and state [double jeopardy] provisions afford the same protections and are 'identical in thought, substance, and purpose.'" *In re Pers. Restraint of Davis*, 142 Wash.2d 165, 171, 12 P.3d 603 (2000) (quoting *State v. Schoel*, 54 Wash.2d 388, 391, 341 P.2d 481 (1959)). The prohibition against double jeopardy "'protect[s] against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction.'" *State v. Graham*, 153 Wash.2d 400, 404, 103 P.3d 1238 (2005) (quoting *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 815, 100 P.3d 291 (2004)). Division One of the Court of Appeals has held that the proper remedy for multiple punishments for the same offense is to vacate the "lesser" offense. *In re Pers. Restraint of Burchfield*, 111 Wash. App. 892, 899, 46 P.3d 840 (2002).

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[5] We note that even if we were to hold that a jury must find the fact that a juvenile adjudication *occurred*, the underlying juvenile adjudication would still not be the result of a jury trial. Thus, under Weber's analysis, we would have to hold that the juvenile adjudication itself must be the result of a jury trial in order for the adjudication to be used to enhance a defendant's sentence based on recidivism. Suppl. Br. of Pet'r at 23. This we decline to do.

[¶23] In a pretrial hearing before the trial court, the State conceded that if the jury convicted Weber of both the attempted murder and the assault charges, the convictions would constitute double jeopardy because both convictions would punish Weber for the same offense. VRP (June 11, 2003) at 62. The State promised that if the jury convicted Weber on both charges, it would ask the court to vacate the lesser offense. *Id.* After the jury found Weber guilty of both second degree attempted murder and first degree assault, the trial court vacated the assault conviction because the attempted murder conviction carried the greater seriousness level and required greater intent. VRP (Aug. 8, 2003) at 24. The Court of Appeals reversed, vacating the second degree attempted murder conviction and reinstating the first degree assault conviction because the assault conviction carried the longer sentence. *Weber*, 127 Wash. App. at 882, ¶ 3, 112 P.3d 1287.

[¶24] Both Weber and the State agree that the remedy for double jeopardy is to vacate the conviction for the lesser offense, but they dispute which of Weber's two convictions constitutes the lesser offense in this case. Under Washington law, assault is not a lesser included offense of attempted murder. *State v. Harris*, 121 Wash.2d 317, 321, 849 P.2d 1216 (1993). The State argues that when neither offense is a lesser included offense, the lesser offense for double jeopardy purposes is the offense that carries the lesser sentence. Suppl. Br. of Resp't at 23-27. The standard sentence range for first degree assault is slightly higher than the standard sentence range for attempted second degree murder.[6] Therefore, the State argues that second degree attempted murder is the lesser offense in this case.

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[6] The trial court assigned Weber an offender score of 8, which produced a standard range of 209 to 277 months for first degree assault and 192.75 to 267.75 months for attempted second degree murder. RCW 9.94A.510. However, that offender score did not include Weber's juvenile adjudication for attempted first degree robbery, which we hold should be included in the offender score. With the juvenile adjudication,

[¶25] Weber, on the other hand, asserts that the proper remedy for a double jeopardy violation is still "to vacate the conviction for the crime that forms part of the proof of the other unless the Legislature has expressly *stated its intent that* the crimes be punished separately or the constituent offense stand." Suppl. Br. of Pet'r at 24 (citing *Whalen v. United States*, 445 U.S. 684, 692, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Freeman*, 153 Wash.2d 765, 775, 108 P.3d 753 (2005)). However, *Whalen* guides only the determination of whether to impose multiple punishments, not the determination of which conviction a court should vacate once the court has determined that multiple punishments are improper, as is the case here. 445 U.S. at 692, 100 S. Ct. 1432.

[¶26] Moreover, contrary to Weber's argument, *Freeman* supports the proposition that the length of sentence is an important consideration in determining which conviction to vacate. In *Freeman*, this court considered whether the legislature authorized separate punishments for assault and robbery. 153 Wash.2d at 771, 108 P.3d 753. In so considering, the court reasoned that the legislature would not have intended the double jeopardy doctrine to operate in a way that would allow the defendant to receive the lesser sentence.

> As the legislature is well aware, when a court vacates a conviction on double jeopardy grounds, it usually vacates the conviction for the crime that forms part of the proof of the other. This is because the greater offense "typically carries a penalty that incorporates punishment for the lesser included offense." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L.Rev. 1, 28 (1995). But when a first degree assault raises a robbery to first degree robbery, the case is

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Weber would have an offender score of 9 or more, which would produce a standard range of 240 to 318 months for first degree assault and 223.5 to 297.75 months for attempted second degree murder. *Id.*

> atypical. The standard sentence for first degree assault (in this case, 111 months) is considerably longer than the standard sentence for first degree robbery (in this case, 41 months). Given the fact of the current sentencing schema, it is unlikely the legislature intended this result. While this is not necessarily dispositive, it does weigh upon our analysis. *Cf. Burchfield*, 111 Wash. App. at 900, 46 P.3d 840 (considering the seriousness level assigned by the legislature when determining how the legislature intended two related crimes to be treated).

Id. at 775-76, 108 P.3d 753 (citations omitted).

[¶27] In *Burchfield*, Division One of the Court of Appeals similarly focused on length of sentence, in addition to seriousness level and degree of felony, in determining which offense to vacate as the lesser offense. 111 Wash. App. at 900, 46 P.3d 840. The court rejected Burchfield's argument that assault was the lesser offense because it results only in injury, whereas manslaughter results in death. *Id.* at 899, 46 P.3d 840. "If we were to accept Burchfield's argument, resentencing for the 'more serious' offense would require a reduction of his sentence from 135 months, the standard range for first degree assault with a weapon enhancement, to 53 months, the standard range for his first degree manslaughter conviction." *Id.* at 900, 46 P.3d 840. However, *Burchfield* does not present the same situation as this case because in *Burchfield* other factors, such as seriousness level and class of felony, also favored vacating manslaughter as the lesser offense.

[¶28] Because second degree attempted murder and first degree assault are both Class A felonies, Weber argues that the lesser offense should consist of the offense that carries the lesser seriousness level and intent requirement. Suppl. Br. of Pet'r at 25-27. However, as the State notes, "the seriousness level is only another, less direct way of examining which crime involves greater punishment" because "[u]nder the SRA, the sole purpose of a crime's seriousness level is to calculate the standard range." Suppl.

Br. of Resp't at 26 (citing RCW 9.94A.510; RCW 9.94A.520). Moreover, the sentencing guidelines do not provide a seriousness level for attempted offenses, making this comparison impossible.[7] Additionally, as the State notes, anticipatory crimes may necessarily require greater intent than a completed crime because they may include the element of "intent to commit the completed crime." Suppl. Br. of Resp't at 27.

[¶29] Weber also points to *State v. Valentine*, 108 Wash. App. 24, 26-27, 29 P.3d 42 (2001), in which Division One of the Court of Appeals considered the remedy for double jeopardy involving the same convictions as in this case--second degree attempted murder and first degree assault. Pet. for Review at 17-18. The *Valentine* court summarily vacated the assault conviction without any analysis as to why it constituted the lesser offense. 108 Wash. App. at 29, 29 P.3d 42. However, *Valentine* is distinguishable from this case because the standard sentence range for the attempted murder conviction was higher than the standard range for the assault conviction in that case. *Id.*

[¶30] Other jurisdictions have also held that the "lesser" crime for double jeopardy purposes is the conviction that carries the lesser punishment. *See, e.g.*, *People v. Driggers*, 812 P.2d 702, 704 (Colo.Ct.App.1991) (vacating crime with lesser punishment as remedy for double jeopardy); *State v. Dillon*, 2001 SD 97, 632 N.W.2d 37, 46-47 (2001) (vacating first degree rape conviction because it had "lower minimum penalty"); *People v. Davis*, 122 Mich.App. 597, 608-09, 333

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[7] The State suggests that because the SRA provides that the standard sentence range for an attempted offense is 75 percent of the standard range for a completed offense, the seriousness level for attempted second degree murder could be 75 percent of the seriousness level for second degree murder (which carries a seriousness level of 14), computing to a seriousness level of 10.5. Suppl. Br. of Resp't at 26; *see* RCW 9.94A.510; RCW 9.94A.515. Therefore, first degree assault, which carries a seriousness level of 12, would have the greater seriousness level. RCW 9.94A.515.

N.W.2d 99 (1983) (holding that where lesser included offense provided for longer prison term, remedy for double jeopardy was vacation of greater offense); *Landers v. State*, 957 S.W.2d 558, 559-61 (Tex.Crim.App.1997) (adopting the "most serious punishment" test in determining which conviction to retain).

[¶31] Additionally, we note that if Weber had received concurrent sentences for his two convictions, he would be required to serve the longer of the two sentences. RCW 9.94A.589. Thus, retaining the offense that carries the greater sentence is the common sense approach. The facts of this case dictate that we follow the straightforward approach of vacating the offense that carries the lesser sentence as the lesser offense. As a result, we hold that the lesser offense for double jeopardy purposes in this case is second degree attempted murder and affirm the Court of Appeals decision to vacate the second degree murder conviction and reinstate the first degree assault conviction.

C. Whether prosecutorial misconduct caused Weber prejudice requiring reversal of his convictions

[¶32] To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997) (citing *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994)). In order to prove the conduct was prejudicial, the defendant must prove there is a "'substantial likelihood the misconduct affected the jury's verdict.'" *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 481-82, 965 P.2d 593 (1998) (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995)). Reversal is not required "'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997)

(quoting *State v. Tharp*, 96 Wash.2d 591, 599, 637 P.2d 961 (1981)).

[¶33] If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wash.2d 668, 719, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wash.2d 570, 596, 888 P.2d 1105 (1995)). Weber did not object to the first two alleged instances of misconduct. VRP (June 25, 2003) at 9-11. At the Court of Appeals, the State argued that Weber did not need to object to the prosecuting attorney's improper questions because the court had already granted Weber's motion in limine to exclude the admitted testimony, citing *Fenimore v. Donald M. Drake Construction Co.*, 87 Wash.2d 85, 92, 549 P.2d 483 (1976), and *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937). Br. of Resp't at 11 n. 4. However, in this court, the State changes its position and argues that defense counsel failed to object, which it interprets as an indication that "any possible prejudice was minimal." Suppl. Br. of Resp't at 29. Because the State changed its position and its original argument reflects a misreading, or at least an overstatement, of the law, we resolve the issue of whether or not Weber's failure to object should be held against him.

[¶34] The State's argument at the Court of Appeals reflects a misreading of *Fenimore* and a possible overstatement of the rule from *Smith*. *Fenimore* stands for the proposition that when a trial court *properly denies* a party's motion to exclude evidence *and* instructs that party to object to the evidence when offered at trial, the party is not "relieved of the burden of objecting to evidence which he believed to be inadmissible." 87 Wash.2d at 92, 549 P.2d 483. Following *Fenimore*, this court held that a party *losing* a motion to exclude evidence has a standing objection to the admission of that evidence at trial unless instructed by the court to

continue to object. *State v. Kelly*, 102 Wash.2d 188, 193, 685 P.2d 564 (1984) (citing *State v. Koloske*, 100 Wash.2d 889, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988)). These cases do not guide the determination of whether Weber was required to object because Weber's motion to exclude evidence was granted, not denied.

[¶35] In a 1937 case, this court held that a party's failure to object to evidence already excluded by a pretrial motion was "not controlling" and did not prevent the defendant from receiving a new trial. *Smith*, 189 Wash. at 429, 65 P.2d 1075. However, the Court of Appeals has concluded that the rule from *Smith* should apply only in limited circumstances because in that case the State demonstrated a "deliberate disregard" for the pretrial order and because an objection "was likely more damaging than almost any answer" in that case. *State v. Sullivan*, 69 Wash. App. 167, 173, 847 P.2d 953 (1993). The Court of Appeals reasoned that the complaining party must continue to object because even if the trial court has determined that certain evidence is inadmissible, the court may not have considered how prejudicial the evidence is or what the remedy for its admission should be. *Id.* at 172, 847 P.2d 953. Additionally, as the Court of Appeals noted, there is great potential for abuse when a party does not object because "[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *Id.* In this case, the Court of Appeals considered *Sullivan* in determining whether Weber was required to object despite winning his pretrial motions. *Weber*, slip op. (unpublished portion) at 15-16.

[¶36] We follow the common sense approach of the Court of Appeals and consider Weber's failure to object even though he received pretrial orders that allegedly excluded the admitted evidence. Without an objection, the trial court never had an opportunity to determine whether the evidence would even have been covered by the pretrial motions, or if it

was covered by the motions, whether the court could have cured any potential prejudice through an instruction. Thus, even when the trial court has already excluded evidence through a pretrial order, the complaining party should object to the admission of the allegedly inadmissible evidence in order to preserve the issue for review, unless an unusual circumstance exists "that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible." *Sullivan*, 69 Wash. App. at 173, 847 P.2d 953. Examples of such unusual circumstances are when the other party's questions were "in deliberate disregard of the trial court's ruling," or "an objection by itself would be so damaging as to be immune from any admonition or curative instruction by the trial court." *Id.*; *see Smith*, 189 Wash. at 428-29, 65 P.2d 1075. Here, it is not clear that the State's questions were in deliberate disregard of the court's ruling or that an objection from Weber would have been so damaging that an instruction would not have cured any prejudice.

[¶37] Weber maintains that the prosecuting attorney committed misconduct that constitutes reversible error in three ways. First, the prosecuting attorney disregarded a pretrial order by soliciting evidence that Detective Alvarez had previously met Weber while investigating his brother for a crime. Pet. for Review at 19. Second, the prosecuting attorney disregarded another pretrial order by introducing evidence of gang membership. *Id.* at 20. Third, the prosecuting attorney made improper arguments during rebuttal closing argument. *Id.* at 21-22. Finally, Weber argues that even if each individual instance of misconduct does not constitute reversible error, the cumulative error doctrine applies. *Id.* at 23. The State concedes that the prosecuting attorney did commit misconduct in the three instances identified by Weber but asserts that the misconduct was not prejudicial and, therefore, does not constitute reversible error and that Weber's cumulative error claim fails. Br. of Resp't at 11, 15, 17, 21.

1. Evidence that the detective met Weber while investigating his brother

[¶38] Weber asserts that the prosecuting attorney committed misconduct by disregarding a pretrial order that excluded evidence that Detective Alvarez met Weber while investigating his brother as a suspect in a stabbing incident. Pet. for Review at 19. During the prosecuting attorney's direct examination of Detective Alavarez, the following exchange occurred:

> Q. Who was that?
> A. Charles Webber [sic].
> Q. Did that name mean anything to you?
> A. Yes, it did.
> Q. Explain why.
> A. Approximately a year prior to that, I was investigating or assisting with an investigation of a stabbing incident where Charles's brother was the prime suspect. And I had contacted Charles during the course of that investigation.

VRP (June 25, 2003) at 9.

[¶39] In a pretrial hearing, the trial court excluded evidence that Detective Alvarez had previously met Weber while investigating a crime involving Weber's brother. VRP (June 11, 2003) at 25. However, the court explicitly did not exclude evidence that the detective had previously met Weber. *Id.* The State concedes that Detective Alvarez's testimony violated the pretrial order but argues that Weber still must prove that the error likely affected the jury's verdict. Br. of Resp't at 11-12.

[¶40] At trial, Weber's attorney failed to object to the error, request a curative instruction, or move for a mistrial. The Court of Appeals determined that the prosecuting attorney did not deliberately disregard the pretrial order. *Weber*, slip op. (unpublished portion) at 17. We agree that the prosecuting attorney did not so clearly act in deliberate disregard of the pretrial order that Weber was excused from

objecting. The pretrial order did not exclude evidence that the detective had previous contact with Weber, and the prosecuting attorney's questions conceivably could have been targeted only at soliciting that information.

[¶41] Additionally, even if we do not hold Weber's failure to object against him, Weber has failed to prove that the prosecutor's questions caused him prejudice that affected the outcome of his trial. As the State notes, the content of Detective Alvarez's testimony may have been more helpful to Weber than prejudicial. Suppl. Br. of Resp't at 29. During the pretrial hearing, the trial court observed that if the jury heard that Alvarez had previous contact with Weber, the jury might make the inference that Alvarez knew Weber from previous arrests or criminal activity. VRP (June 11, 2003) at 18. Defense counsel agreed and acknowledged that he might later "choose to introduce the context in which he knows Mr. Webber [sic]." *Id.*

[¶42] Weber failed to preserve the error on appeal by not objecting. He also failed to carry his burden of proving that there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. As a result, we hold that the prosecuting attorney did not commit misconduct warranting a new trial in this instance.

2. Evidence of gang membership

[¶43] Second, Weber asserts that the prosecuting attorney committed misconduct by violating a pretrial order excluding evidence of gang membership. The following exchange also occurred during the prosecuting attorney's direct examination of Alavarez:

> Q. Have you ever in your contacts with anyone as a patrol officer, ever observed anyone besides the defendant Charles Webber [sic] with a 206 tattoo on the back of his neck?
>
> A. No.
>
> Q. What about during the course of your duties as a special enforcement agent in investigating gangs, have you ever

come across another individual with the tattoo of a 206 on the back of his neck?

A. Not of that size, no.

VRP (June 25, 2003) at 10-11.

[¶44] In a pretrial hearing, the trial court excluded all evidence of gang membership but did not exclude evidence of "any marks that may have been observed by any witness or testimony of any marks that may currently be present on Mr. Webber [sic]." VRP (June 10, 2003) at 147; VRP (June 11, 2003) at 10. The State concedes that the prosecuting attorney's question violated the pretrial order but argues that it was not so prejudicial that it likely affected the jury's verdict. Br. of Resp't at 15.

[¶45] Again, Weber's attorney failed to object to the error, request a curative instruction, or move for a mistrial. And again, the record does not so clearly indicate that the prosecuting attorney deliberately disregarded the pretrial order as to excuse Weber's failure to preserve the error on appeal. The pretrial order did not exclude evidence of "marks that may have been observed by any witness," and the prosecuting attorney's questions conceivably could have been targeted only at soliciting that information.

[¶46] Previously, Alvarez testified that he "primarily handle[s] gang cases or gang incidents." VRP (June 25, 2003) at 7. It is clear from the record that the prosecuting attorney's questions about the tattoos were targeted at establishing how common "206" tattoos are in the effort to identify Weber as the shooter. The questions were not clearly targeted at establishing that Weber was a gang member. Additionally, Alvarez's answer indicated that he had not seen a 206 tattoo the size of Weber's in his work investigating gangs, an answer that resulted in minimal, if any, prejudice.

[¶47] Moreover, as the State notes, Alvarez's testimony that he primarily investigates gang incidents "was not the subject of a motion in limine, nor was it objected to." Br. of Resp't at 16; VRP (June 25, 2003) at 7. Several other witnesses

testified regarding the tattoo on Weber's neck, including Manzo, who testified without objection that the "206" tattoo stood for "the area that you live in." VRP (June 18, 2003) at 131-32. The "admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection." *Ashley v. Hall*, 138 Wash.2d 151, 159, 978 P.2d 1055 (1999).

[¶48] Thus, even if we do not hold Weber's failure to object against him, Weber has failed to prove that Alvarez's testimony affected the outcome of his case. This is particularly true in light of the other testimony that the trial court admitted regarding "206" tattoos and gang activity, and in light of the other evidence presented against Weber at trial. As a result, we hold that Weber has failed to prove that the prosecutor's questions caused him prejudice that affected the outcome of his trial.

3. Improper argument in rebuttal closing argument

[¶49] Third, Weber argues that the prosecuting attorney committed misconduct by making prejudicial statements in rebuttal closing argument. Weber asserts that although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements not supported by the record. *State v. Rose*, 62 Wash.2d 309, 312, 382 P.2d 513 (1963) (citing *State v. Heaton*, 149 Wash. 452, 271 P. 89 (1928); *Rogers v. Kangley Timber Co.*, 74 Wash. 48, 132 P. 731 (1913)). However, even improper remarks by the prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wash.2d at 86, 882 P.2d 747 (citing *State v. Dennison*, 72 Wash.2d 842, 849, 435 P.2d 526 (1967); *State v. Graham*, 59 Wash. App. 418, 428-29, 798 P.2d 314 (1990)).

[¶50] The State concedes that the prosecuting attorney's remarks in rebuttal closing argument were improper but asserts that they were unlikely to have affected the jury's verdict. Br. of Resp't at 17. In rebuttal closing argument, the prosecuting attorney, Andy Colasurdo, made the following statements:

> Now, there are cases that go before court all the time, like murders where there is no victim to explain what had happened. No eyewitness to the crime. Yet, we prove those.
>
> In another unit in my office, SAU, the Special Assault Unit where you deal with sex crimes--
>
> Mr. Hall: Objection, your honor. There is no foundation for that type of evidence.
>
> The court: Overruled.
>
> Mr. Colasurdo: You deal with crimes against small children, crimes where a child has been molested.
>
> Mr. Hall: Objection, your honor. Also, no foundation for that type of argument.
>
> The court: Why don't you move on.
>
> Mr. Colasurdo: It's a legitimate argument, your honor.
>
> The court: Move on, counsel.
>
> Mr. Colasurdo: There are times for which there are no witnesses and for which there are, as I just mentioned, no evidence. Yet people are convicted of those crimes all the time.
>
> Why? Because a jury finds someone credible.

VRP (June 30, 2003) at 70-71. However, defense counsel, Randall Hall, made the following statements in his earlier closing argument:

> Ladies and gentlemen, please take just 20 seconds and imagine, if you can, someone that you are very close to being accused of committing an awful crime, and what you would expect the jury to hear as evidence.
>
> Well, you would certainly expect to hear from eyewitnesses, wouldn't you? This case had eyewitnesses as well. But did you hear from them? No.

. . ..

That is the state's obligation to bring these witnesses in.

Id. at 47-48 And defense counsel continued:

Well, besides witnesses, wouldn't you like to hear or see something about physical evidence. . ..

What didn't you see? You didn't see a gun. You didn't see fingerprints.

. . ..

How about a thorough search.

. . ..

They didn't do it. Why? They either didn't want you to have the information or they were negligent about how they conducted the investigation.

The end result is the same. You don't have the information that you need to be able to make a decision in this case.

Id. at 49-51.

[¶51] The State argues that the prosecuting attorney's argument, although improper, was made in response to defense counsel's argument about the type of evidence that the State was required to produce. Br. of Resp't at 18. The State cites *State v. Farr-Lenzini*, 93 Wash. App. 453, 471, 970 P.2d 313 (1999), in which the prosecuting attorney responded to defense counsel's argument that the defendant did not fit the profile of an eluder by stating that Ted Bundy did not fit the profile of a mass murderer. The Court of Appeals held that the prosecuting attorney's remarks were a "rhetorical overreaction to a defense argument" but that they did not deny the defendant a fair trial because they were addressed through the jury instructions. *Id.*

[¶52] In this case, the prosecuting attorney's argument was clearly a response to defense counsel's argument. Additionally, the court instructed the jury to base its decision only on the testimony of witnesses and exhibits in the case and that the attorneys' arguments were not evidence. CP at 45-46. As a result, we hold that Weber has failed to prove that the prosecuting attorney's remarks were so prejudicial that they could not be cured by the jury instructions.

4. Cumulative error doctrine

[¶53] Finally, Weber asserts that the cumulative error doctrine applies to the prosecutor's misconduct. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wash.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.* As discussed above, Weber has failed to prove how each alleged instance of misconduct affected the outcome of his trial. Similarly, Weber has not indicated how these combined instances of misconduct affected the outcome of his trial. As a result, we hold that Weber's cumulative error doctrine claim fails in this case and that the prosecuting attorney did not commit misconduct that constituted reversible error.

IV. CONCLUSION

[¶54] We hold that the inclusion of Weber's juvenile adjudications in his offender score fell under *Apprendi*'s prior conviction exception and did not violate *Blakely*. We also hold that, in this case, the proper remedy for Weber's double jeopardy violation is to vacate the conviction that carries the lesser sentence. Finally, we hold that the prosecuting attorney did not commit misconduct warranting a new trial. We affirm the Court of Appeals and remand the case to the trial court for resentencing consistent with this opinion.

ALEXANDER, C.J., BRIDGE, OWENS, and J.M. JOHNSON, JJ., concur.

MADSEN, J. (dissenting) – [¶55] The majority holds that juvenile adjudications count as prior convictions and therefore are not subject to the rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). The majority's holding is inconsistent with the United States Supreme Court's reasons for excluding prior convictions from the rule, and with statutes and case law from this state. Fundamentally, the majority's conclusion condones a significant violation of Mr. Weber's due process rights and further undermines the purposes of our Juvenile Justice Act of 1977, chapter 13.40 RCW.

[¶56] In addition, prosecutorial misconduct in this case requires a new trial, contrary to the majority's view. I respectfully dissent.

ANALYSIS

[¶57] In addressing the question whether a juvenile adjudication counts as a prior conviction for purposes of *Apprendi*'s rule, the majority unfortunately dismisses the importance of the other cases that give meaning to the rule, leading to its erroneous conclusion that juvenile adjudications count as prior convictions. When the Court decided *Apprendi*, it did not do so in a vacuum. Rather, *Apprendi* drew from prior decisions. The Court could not have been clearer about this, as it explained:

> The question whether Apprendi had a constitutional right to have a jury find [asserted] bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in *Jones v. United States*, 526 U.S. 227[, 143 L.Ed.2d 311, 119 S. Ct. 1215] (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial

> guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243, n. 6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.
>
> . . ..
>
> [O]ur reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi, 530 U.S. at 475-76, 490, 120 S. Ct. 2348. The rule was subsequently refined by the Court when it added that "statutory maximum" means the maximum sentence that a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis omitted).

[¶58] To understand *Apprendi*, it is imperative to understand *Jones* because in *Jones* the Court explained why it had held it was permissible, in *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), to use a prior conviction as a sentencing factor to increase a statutorily mandated maximum punishment.[1] The Court said in *Jones* that "unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying *the fair notice,*

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[1] The defendant in *Almendarez-Torres* argued that the fact of his prior conviction, used to increase his punishment, was an element of the offense that had to be set out in the indictment. The Court rejected the argument.

reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249, 119 S. Ct. 1215 (emphasis added).[2]

[¶59] Thus, the prior conviction exception to the rule stated in *Apprendi* is premised on there having been specific constitutional safeguards underlying a prior conviction used to increase the punishment for a subsequent offense. Therefore, in order to fall within the prior conviction exception to the rule in *Apprendi*, a juvenile adjudication must have had the same constitutional safeguards in place as in *Jones*, in particular the right to trial by jury and proof beyond a reasonable doubt.

[¶60] Other courts have reached this conclusion after carefully examining the Court's cases. In *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir.2001), the Ninth Circuit read *Jones* and *Apprendi* to mean that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." If juvenile adjudications lack these due process guaranties, the court reasoned, they do not fall within the exception. *Id.* at 1194. Further, the Ninth Circuit said that insofar as the government argued that the exception should be extended to include nonjury juvenile adjudications, the "*Apprendi* Court's serious reservations about the reasoning of *Almendarez-Torres* counsel[ed] against any extension[s]." *Id.*; *see Apprendi*, 530 U.S. at 487, 489-90, 120 S. Ct. 2348 (noting that it was arguable that *Almendarez-Torres* was wrongly decided). Other courts have

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[2] The majority incorrectly reads *Jones*. See majority at 650- 51. When read in context, the word "possible" refers to "the possible constitutional distinctiveness" of recidivism from "other facts that might extend the range of possible sentencing." *Jones*, 526 U.S. at 249, 119 S. Ct. 1215. The Court did not imply that any constitutional safeguards other than fair notice, proof beyond a reasonable doubt, or the right to jury trial would be sufficient for a prior conviction to come within the "prior conviction" exception to the *Apprendi* rule, contrary to the majority's conclusion.

also held that juvenile adjudications do not fall within the prior conviction exception. *State v. Harris*, 339 Or. 157, 118 P.3d 236 (2005); *State v. Brown*, 03-2788 (La.7/6/04), 879 So.2d 1276.

[¶61] The majority rejects *Tighe* and similar cases, relying instead on the reasoning of courts that have concluded that juvenile proceedings provide sufficient procedural safeguards to qualify under the prior conviction exception. In *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir.2002), for example, the court reasoned that whether juvenile adjudications should be exempt from *Apprendi*'s rule should turn on "an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *See also, e.g., United States v. Jones*, 332 F.3d 688 (3d Cir.2003); *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002).

[¶62] This reliance is misplaced. There are critical differences between the due process necessary for a juvenile adjudication and the due process safeguards required for an adult conviction. The differences exist because the juvenile justice system is fundamentally different from and serves different purposes than the criminal justice system.

[¶63] While the Juvenile Justice Act has been amended many times over the years, the act has always focused on the needs of the juvenile and the goals of rehabilitation and accountability. *State v. Watson*, 146 Wash.2d 947, 952- 53, 51 P.3d 66 (2002); *Monroe v. Soliz*, 132 Wash.2d 414, 419-20, 939 P.2d 205 (1997) (Juvenile Justice Act's policy is holding juveniles accountable for their acts and responding to the needs of juvenile offenders); *State v. Schaaf*, 109 Wash.2d 1, 4, 743 P.2d 240 (1987) (juvenile justice system is rehabilitative in nature while the criminal system is punitive); *State v. Meade*, 129 Wash. App. 918, 925, ¶ 15, 120 P.3d 975 (2005) (Juvenile Justice Act remains focused on rehabilitation); *State v. K.E.*, 97 Wash. App. 273, 982 P.2d 1212 (1999) (a court may impose a downward disposition if it finds that the standard range disposition would be an

excessive penalty because less time is needed for rehabilitation); *State v. J.H.*, 96 Wash. App. 167, 172-75, 185, 978 P.2d 1121 (1999) (addressing 1997 amendments and concluding that legislative intent had changed only insofar as it increased the emphasis on responding to the needs of juvenile offenders, and the only purpose added to the Juvenile Justice Act list of purposes was encouragement of the juvenile's parents, guardian's, or custodian's active participation in the juvenile justice process; and, while fair to say that 1997 amendments increased emphasis on accountability for serious criminal activity, amendments also enhanced court's ability to address juvenile offenders' needs, with emphasis still placed on rehabilitation, whereas adult system focuses almost entirely on punishment); *see also, e.g.*, RCW 13.40.010(2) (listing goals of the Juvenile Justice Act, including protection of the public, accountability, punishment, and provision of necessary treatment for juvenile offenders); RCW 13.40.320 (addressing juvenile offender basic training camps and stating that they must emphasize building self-esteem, confidence, and discipline and shall include rehabilitation and training components); RCW 13.40.038 (state policy is that "juvenile detention facilities provide a humane, safe, and rehabilitative environment"); RCW 13.40.460 (addressing administration of juvenile rehabilitation programs); RCW 13.40.500-.540 (concerning community juvenile accountability programs).

[¶64] In fact, it is because of the fundamental difference between the juvenile justice system and the criminal system that the United States Supreme Court and this state's appellate courts have held that there is no right to a jury trial in the juvenile justice system. *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L.Ed.2d 647 (1971); *Monroe*, 132 Wash.2d at 419-20, 939 P.2d 205; *Schaaf*, 109 Wash.2d 1, 743 P.2d 240; *State v. Lawley*, 91 Wash.2d 654, 591 P.2d 772 (1979); *In re Welfare of Estes*, 73 Wash.2d 263, 265-68, 438 P.2d 205 (1968); *cf. Meade*, 129 Wash. App. at 925-26, ¶ 16, 120 P.3d 975 (juvenile has no right to

a jury to find facts that would support a manifest injustice disposition). In contrast, the criminal justice system is primarily punitive. *Monroe*, 132 Wash.2d at 420, 939 P.2d 205.

[¶65] The decision in *McKeiver* that fundamental fairness does not require a jury trial in juvenile adjudications is based on the fact that the juvenile who is adjudicated is not treated as a criminal. This court found the same to be true of this state's juvenile justice system. *Lawley*, 91 Wash.2d 654, 591 P.2d 772. And with each new challenge following legislative amendments, as occurred in *Lawley*, the court has confirmed this conclusion. The Juvenile Justice Act still emphasizes accountability and rehabilitation, with individualized treatment of the offender.

[¶66] Cases settling for a "reliability" standard for juvenile adjudications disregard the role that the jury plays in assuring a fair decision. The United States Supreme Court explained that the protection that comes with a jury entails more than merely finding the facts:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury

> trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968) (footnote omitted).

[¶67] Because the right to a jury trial involves far more than a simple matter of determining the facts supporting a guilty verdict, the absence of that right in the juvenile justice system militates strongly against equating a juvenile adjudication to a criminal conviction obtained following a proceeding where the right to a jury trial attached. A juvenile adjudication without a jury determination does not compare to a criminal conviction following a trial by jury and should not be exempt from the rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S. Ct. 2348.

[¶68] The majority also points out, though, that the legislature has dictated inclusion of juvenile adjudications in criminal history and enacted statutes providing that "adjudication" has the same meaning as "conviction." Majority at 652-53. Whether the legislature has included juvenile adjudications as part of criminal history has no bearing on whether these adjudications can be included under *Apprendi* and *Blakely*. As to RCW 13.04.011(1), which says that "adjudication" has the same meaning as "conviction," the Court of Appeals has correctly concluded that this

definition has engendered some confusion about terminology but, regardless, the features of the juvenile justice system that have weighed against finding a right to a jury trial remain the same. *J.H.*, 96 Wash. App. at 175, 978 P.2d 1121. The juvenile justice system and the criminal justice system are still demonstrably different, with different emphasis and different consequences.

[¶69] Finally, most commentators addressing this issue argue forcefully that a juvenile adjudication does not fall within the "prior conviction" exception to the *Apprendi* rule. One says, in summary, that "[s]ince the juvenile system of justice was founded on the principle of rehabilitation, and continues to embrace the 'rehabilitative ideal' in modern times, there are significant constitutional differences in the degree of procedural due process and fundamental fairness involved in adult convictions and juvenile adjudications" and because "juvenile adjudications [are] subject to less stringent procedural standards than adult criminal proceedings," the *Apprendi* rule "must be limited to prior convictions that were themselves obtained through proceedings affording individual defendants the same procedural safeguards they would be entitled to in the adult criminal justice system." Stephen F. Donahoe, Note, *The Problem With Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed* Career Criminal Sentencing, 66 U. PITT. L.REV. 887, 907 (Summer 2005); *see also* Kimberly L. Johnson, Note & Comment, *Should Juvenile Adjudications Count as Convictions for* Apprendi *Purposes?*, 20 GA. ST. U.L.REV. 791 (Spring 2004) (juvenile adjudications do not come within the prior conviction exception to the *Apprendi* rule; the juvenile system is different from the criminal justice system in that juvenile adjudications have a rehabilitative purpose and juveniles do not have the same rights as adults in the criminal justice system, in particular the right to trial by jury).

[¶70] Another concludes that the "Supreme Court's recent jury trial jurisprudence and its findings in *Ballew [v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L.Ed.2d 234 (1978)] concerning the relative reliability of larger fact-finding bodies suggest that the *Tighe* court's understanding of juvenile adjudications is more constitutionally sound than that espoused by the *Smalley* court." Casenote, *Eighth Circuit Holds an Adjudication of Juvenile Delinquency To Be a "Prior Conviction" for the Purpose of Sentence Enhancement at a Subsequent Criminal Proceeding*--United States v. Smalley, *294 F.3d 1030 (8th Cir.2002)*, 116 HARV. L.REV. 705, 712 (Dec.2002).

[¶71] Others also favor the *Tighe* approach. *E.g.*, Jeremy W. Hochberg, Note, *Should Juvenile Adjudications Count as Prior Convictions for* Apprendi *Purposes?*, 45 WM. & MARY L.REV. 1159 (Feb.2004) (concluding that the United States Supreme Court should adopt the *Tighe* approach of a blanket ban on counting juvenile adjudications as prior convictions based on the fact that juvenile adjudications are fundamentally different from adult convictions in purpose and procedure); Brian P. Thill, Comment, *Prior "Convictions" Under* Apprendi: *Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt*, 87 MARQ. L.REV. 573, 601 (Spring 2004) ("[i]n light of the Supreme Court's holding in *Apprendi* and the potentially devastating effects to one of the fundamental liberties afforded to the people of the United States under the Constitution, courts should heed the Supreme Court's warning and continue to view the [prior conviction] exception created in *Almendarez-Torres* as a narrow one"); Nicole M. Romine, Note, *A Compromised Solution: Balancing the Constitutional Consequences and the Practical Benefits of Using Juvenile Adjudications for Sentence Enhancement Purposes*, 45 WASHBURN L.J. 113, 133 (Fall 2005) (concluding that the current use of juvenile adjudications to enhance a criminal sentence is unconstitutional

and proposing that states should pass statutes permitting use of "qualify[ied] juvenile adjudication[s]," i.e., adjudications following a juvenile adjudication where the juvenile had a jury trial and the right to counsel; "[b]y giving juveniles the same procedural protections afforded adults, such legislation would remove the constitutional concerns of using juvenile adjudications for sentence enhancement" and this course would "also benefit[ ] society by punishing continued criminality and protecting the public").

[¶72] In sum, the reason for the prior conviction exception to the *Apprendi* rule is that the prior convictions themselves were accompanied by due process safeguards, including, most notably, the right to have a jury determine the underlying facts beyond a reasonable doubt. There is no substitute for the right to trial by jury. Since juveniles do not have the right to a jury in a juvenile adjudication, I would hold that their adjudications do not correspond to criminal convictions for purposes of the prior conviction exception to *Apprendi*'s rule.

[¶73] The majority also concludes that prosecutorial misconduct does not require reversal. I disagree.

[¶74] The first two claimed instances of misconduct involve violations of the trial court's pretrial rulings excluding evidence. As to these claims, Weber's counsel did not object at trial. I agree with the majority that the defendant should have an obligation to notify the trial court of the violation so that corrective action can be taken, if possible. However, I would not impose a heavy burden on the defendant with respect to preservation of such error. The defendant has, after all, already prevailed on the pretrial motion and "should be entitled to rely on that ruling without again raising objections" to admissibility of the evidence "during trial." *State v. Koloske*, 100 Wash.2d 889, 896, 676 P.2d 456 (1984), *overruled on other grounds*, *State v. Brown*, 113 Wash.2d 520, 782 P.2d 1013 (1989). Accordingly, the court should engage in every favorable inference in favor of the defendant when deciding whether the failure to object should

preclude review of erroneous admission of evidence that was ruled inadmissible in a pretrial order.

[¶75] Defying a pretrial ruling excluding testimony by Detective George Alvarez that he had previously met Weber during a criminal investigation of Weber's brother, the prosecutor asked questions that were bound to elicit testimony forbidden by the pretrial ruling. In particular, the open-ended "explain why" question asked after Detective Alvarez was asked whether the name Charles Weber meant anything to him, and he had answered "yes," was bound to lead to the circumstances associated with his criminal investigation of the defendant's brother--because those where the circumstances under which the detective knew the name. It strains credulity to think that the prosecution would not have foreseen where this questioning would lead and for the majority to dismiss it on the basis that the detective *could* have answered the question in another way. The State correctly concedes that error occurred. The majority incorrectly concludes the prosecuting attorney did not deliberately disregard the pretrial order.

[¶76] The second claim of misconduct concerns the trial court's ruling excluding any reference to gang-related membership or expert testimony about gangs. The prosecuting attorney asked whether Detective Alvarez had ever observed, when he was a patrol officer, anyone besides the defendant with a "206" tattooed on the back of his neck, and the detective responded "no." The question was altered to cover the time Alvarez acted as a special enforcement agent investigating gangs, and Detective Alvarez responded that he had not seen "another individual" with such a tattoo "of that size." Later questions were asked about whether Weber's brother had a "206" tattooed on his neck.

[¶77] Again, the State correctly concedes that the trial court's pretrial order was violated. The majority incorrectly concludes that there is no clear indication that the prosecuting attorney deliberately disregarded the pretrial order. As the Court of Appeals said, the violation is clear

and inexcusable. The inference from this testimony was that the detective had seen others with a smaller version of the tattoo while he was investigating gangs and that Weber, who has such a tattoo, is a member of a gang. The questioning was in direct violation of the trial court's pretrial ruling, and it is inconceivable that the State could have pursued this line of inquiry without realizing it would lead to inferences about Weber and his brother being members of a gang. The State deliberately disregarded the trial court's ruling, and it is quite surprising that the majority concludes otherwise.

[¶78] Finally, in closing argument, the prosecuting attorney responded to defense counsel's claim of insufficient evidence for a conviction by arguing that the State has successfully prosecuted other cases, including sex crimes and child molestation, where there have been no witnesses or direct evidence. Weber's counsel objected to this argument, and the court, after initially overruling the objection, then advised the prosecuting attorney to move on.

[¶79] The majority accepts the proposition that this argument was in response to defense counsel's argument. Perhaps. But the defense is entitled to claim there is insufficient evidence for a conviction. The State is not entitled to inflame the jury and encourage it to convict regardless of the evidence and the requirement of proof beyond a reasonable doubt.

[¶80] I would conclude as to each instance of claimed misconduct that error occurred and that the error is properly before the court. The sole remaining question is whether the error is so prejudicial as to require reversal. Whether or not the prejudicial effect of each of these errors independently requires reversal, the cumulative effect is such that reversal is required. *See State v. Coe*, 101 Wash.2d 772, 789, 684 P.2d 668 (1984) (court finds that cumulative error requires a new trial); *State v. Greiff*, 141 Wash.2d 910, 929, 10 P.3d 390 (2000) (statement of cumulative error rule--cumulative error may warrant reversal, even if each error alone would not constitute reversible error).

[¶81] These errors left the jury with the impression that Weber was a dangerous career criminal engaged in terrible crimes (evidence relating him to his brother and a previous criminal investigation; the impermissible evidence implying that Weber was involved in gangs; and the closing argument comparing this case and the lack of direct evidence with cases involving sex crimes and child molestation) who should and could be convicted despite a lack of evidence and in spite of the beyond-a-reasonable-doubt standard (the improper closing argument).

[¶82] Based on prosecutorial misconduct this case should be reversed and remanded for a new trial.

SANDERS, C. JOHNSON, and CHAMBERS, JJ., concur.

(2)

No. 06-1543

In The Supreme Court of the United States

Bounpone B. Sasouvong,

Petitioner,

v.

WASHINGTON,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) except as argued below.

STATEMENT

Washington State has a determinate sentencing scheme. 9.94A RCW. Pursuant to that scheme an adult offender is presumptively sentenced within a standard sentencing range. The range is determined by a combination of two factors. The first is a legislative determination of the seriousness of the offense for which the offender is being sentenced. The second is the defendant's criminal history which has not been "washed out" due to the time elapsed between conviction and the current offense. Criminal history includes both adult and juvenile convictions. RCW 9.94A.030(12), 9.94A.525.

A jury convicted the defendant of residential burglary on May 20, 2003. After the verdict entered he absconded and was not sentenced until June 7, 2004. At sentencing the State calculated the defendant's offender score at 10, based on six prior adult convictions and five prior juvenile convictions. The defendant acknowledged that his prior juvenile convictions counted toward his offender score calculation. App A. The trial court accepted the parties statement regarding the defendant's criminal history and determined his offender score was 10, resulting in a standard range sentence of 63-84 months confinement.

On appeal to the Washington State Court of Appeals the defendant contended the juvenile convictions should not have counted toward his offender score. He argued that Due Process forbids the use of juvenile adjudications to raise an adult offender's

standard range where as a juvenile the defendant had no right to a jury trial.

In its response, the State appended the defendant's guilty plea forms and judgments from his juvenile adjudications. App B. The defendant objected on the basis that they were not before the trial court. App C. The State moved to supplement the record. App. D. The court declined to rule on the motion because the issue raised could be resolved without reference to those documents. App. E.

The Court of Appeals rejected the defendant's argument and affirmed his sentence. The defendant petitioned to the State Supreme Court. The Court had rejected an identical issue in State v. Weber, 149 P.3d 646 (2006), cert denied, 127 S.Ct. 2986 (2007) which denied review.

REASONS FOR DENYING THE PETITION

The court should deny review for three reasons. First, the defendant overstates the conflict between courts which have considered the issue presented here. The ruling in this case is consistent with the vast majority of those courts which have considered the issue. Second because the issue was not litigated at the trial court level, the record was not sufficiently developed to render a comprehensive decision on this issue. To the extent there is a record, it is not settled. Third, the Court does not have jurisdiction to consider a portion of the defendant's argument because it was not litigated in the State Courts.

A. The Court's Decision Is Consistent With An Overwhelming Majority Of Courts That Have Considered This Issue.

This Court has stated that "recidivism - is a traditional, if not the most traditional basis for a sentencing court's increasing an offender's sentence." Almendarez-Torres v. U.S., 523 U.S. 224, 243, (1998). As such, absent legislative intent to make them so, prior convictions are not elements of a crime which must be pled and proved to a jury. Almendarez-Torres, 523 U.S. at 247. This Court distinguished recidivism from all other facts which enhanced a defendant's sentence beyond the statutory maximum in Jones v. U.S., 526 U.S. 227 (1999). The Court suggested one possible basis for that distinction was the constitutional guarantees of fair notice, reasonable doubt, and the right to a jury trial. Jones, 526 U.S. at 249. The Court retained this distinction in Apprendi v. New Jersey, 530 U.S. 466 (2000). The Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 489. (emphasis added)

In the wake of these decisions five federal courts of appeals and six state supreme courts have addressed whether prior juvenile adjudications in which the juvenile offender was not entitled to a jury trial, fell within the prior conviction exception outlined in Almendarez-Torres and preserved in Apprendi. The overwhelming majority of those courts have concluded that those juvenile adjudications are encompassed within that exception. Those courts reasoned that proceedings which afforded juveniles all of the process they are due result in a reliable determination of guilt. This determination may be constitutionally relied upon by trial courts in determining offender's maximum penalty.

Juvenile adjudications were first determined to be convictions for Apprendi purpose in U.S. v. Smalley, 294 F.3d 1030 (8th Cir. 2002) cert. denied, 537 U.S. 1114 (2003). The court acknowledged Apprendi exempted prior convictions from its general rule because of the certainty of procedural safeguards which supported them. While the court noted Apprendi "established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles." Smalley, 294 F.3d at 1032. Smalley concluded the procedural safeguards afforded juvenile defendants, including notice, right to counsel, right to confront and examine witnesses, the privilege against self incrimination, and proof beyond a reasonable doubt "are more than sufficient to ensure the reliability that Apprendi requires". Smalley, 294 F.3d at 1033. Lack of a jury trial did not undermine the reliability of those adjudications because "the use of a jury in the juvenile context would 'not strengthen greatly, if at all, the fact finding function' and is not constitutionally required" Smalley, 294 F.3d at 1033 quoting McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

The question was next considered in Jones v. U.S., 332 F.3d 688 (3rd Cir. 2003) cert. denied, 540 U.S. 1150 (2004). The court observed that neither Apprendi nor Jones addressed whether juvenile adjudications could constitutionally qualify as convictions to be found by a judge before setting sentence. Like the Smalley court, Jones recognized that where juveniles have certain constitutional rights, they do not have a constitutional right to a jury trial. The court concluded that where a juvenile was afforded all of the constitutional protections he was due a prior non-jury juvenile adjudication may properly be characterized as a prior conviction for Apprendi purposes. Jones, 332 F.3d at 696.

The Eleventh Circuit followed the reasoning of the Eighth and Third Circuits in U.S. v Burge, 407 F.3d 1183, cert. denied, 126 S.Ct. 551 (2005). The court had earlier determined that prior adult convictions need not be proven to a jury for sentencing purposes because "the defendant has received the totality of constitutional protections due in the prior proceeding on the predicate offense." Burge, 407 F.3d at 1191 quoting, U.S. v. McGatha, 892 F.2d 1520, 1526 (11th Cir. 1990). Similarly, because juveniles are afforded all of the constitutional protections due in the prior juvenile proceeding, those adjudications may properly be characterized as a prior conviction. Burge, 407 U.S. at 1191.

Most recently the Sixth Circuit has joined the majority of courts that have considered this issue in U.S. v. Crowell ___ F.3d ___, (6th Cir. 2007) (WL 1814333). The court adopted the earlier courts' reasoning that Apprendi did not create a bright line rule setting out necessary procedural components to qualify a prior determination of guilt as a "conviction" which may be used to establish the defendant's sentence range. Rather, juvenile adjudications obtained through all of the procedural safeguards due juveniles did not violate due process or the holding in Apprendi.

The majority of State courts which have considered this issue followed the lead of the Federal courts. Washington State concluded that juvenile adjudications do constitute "convictions" which may be used in adult sentencing. State v. Weber, 149 P.3d 646 (2006) cert. denied, 127 S.Ct. 2986 (2007). The court relied on the State's historical use of juvenile adjudications at adult sentencing hearings and the legislative amendments to the Juvenile Justice Act which shifted its focus from rehabilitation to more traditional criminal punishment. It also considered the legislative requirement that, with the exception of the right to a jury trial, juveniles be afforded the same procedural protections as adults.

which was evidence of their reliability. The court concluded "in light of the aforementioned strong state indicators, we hold juvenile adjudications are convictions for the purposes of Apprendi's prior conviction exception." Weber, 149 P.3d at 653.

Earlier, other State courts agreed with this analysis. In Kansas the court determined juvenile adjudications were convictions to be used in adult sentencing proceedings in State v. Hitt, 42 P.3d 732 (2002), cert. denied, 537 U.S. 1104 (2003). The court reasoned Apprendi carved out the prior conviction exception based on the certainty afforded by procedural protections. It then held juvenile adjudications "are included within the historical cloak of recidivism and enjoy ample procedural safeguards" and therefore they were included within the Apprendi prior conviction exception. Hitt, 42 P.3d 15 740.

The Indiana Court followed the majority rule in Ryle v. State, 842 N.E.2d (2005), cert. denied, 127 S.Ct. 90 (2006). It reasoned that juvenile adjudications contained sufficient procedural safeguards to be reliable for the purpose of the prior conviction exception. In doing so the court noted juvenile adjudications were reliable enough to form the basis for confinement or to order wardship. Ryle, 842 N.E.2d at 323.

Minnesota has also joined the majority of court on this issue in State v. McFee, 721 N.W.2d 607 (2006). The court adopted the reasoning that juvenile adjudications are sufficiently reliable to fit within the prior conviction exception, stating "[i]t is illogical to say that a defendant is entitled to more process when the prior felonious behavior is used to increase a sentence than when the decision is made as to whether the felonious behavior occurred in the first instance." McFee, 721 N.W.2d at 617.

A single federal court, and two state courts, has found juvenile adjudications may not be used to determine an adult offender's sentence. Those opinions do not represent a significant split of authority on this question.

The first court to consider the question was U.S. v. Tighe, 266 F.3d 1187 (2001). The majority of that court relied on the language of this Court in Jones, suggesting that one reason to distinguish prior convictions from other facts which enhance an offender's sentence is that "'a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.'" Tighe, 266 F.3d at 1193 quoting Jones, 526 U.S. at 249. The Court then mechanically applied this language to the question regarding juvenile adjudications, without considering the rationale behind it. It determined a jury trial guarantee was absolutely required in order to qualify under Apprendi's prior conviction exception. Tighe, 266 F.3d at 1194.

Notably, Tighe did not explicitly overrule its prior decision in U.S. v. Williams, 891 F.2d 212 (1989) cert.denied, 494 U.S. 1037 (1990). The Williams court stated "if it does not violate due process for a juvenile to be deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced due to this juvenile adjudication." Williams 891 F.2d at 215. This is, in essence, the same rationale adopted by the majority of courts who have considered this question.

Tighe chose to distinguish the ruling in Williams on the basis that the sentence in Williams did not result in a sentence which increased the statutorily mandated range for the sentence. Tighe, 266 F.3d at 1192. This left open the possibility that there were some cases in which the Ninth Circuit would have found the

use of prior juvenile adjudications permissible. Later the Ninth Circuit acknowledged that the majority rule on this issue was not contrary to, or involved an unreasonable application of Supreme Court precedent. Boyd v. Newland, 467 F.3d 1139 (9th Cir. 2006). These rulings significantly weaken the Tighe court's decision.

The two state opinions which have held that juvenile adjudications do not fall within Apprendi's prior conviction exception have done so on independent state grounds.

The Louisiana Supreme Court relied on Article 1, §17 of its state constitution to find juvenile adjudications, in which the offender was not afforded a right to a jury trial, to be non-criminal. State v. Brown, 879 S2.2d 1276 (2004) cert. denied, 543 U.S. 1177 (2005). The provision required the right to a jury trial as a prerequisite to a criminal conviction. The court stated "[i]t would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer." Brown, 879 So.2d at 1289. Nevertheless, the court recognized a contrary, but reasonable school of thought, on whether juvenile adjudications could qualify as prior convictions for felony sentence enhancement purposes. Brown, 879 So.2d at 1285.

The Oregon Supreme Court similarly rejected the majority rule on this issue at least in part on state grounds in State v. Harris, 118 P.3d 236 (2005). The court agreed that the procedural protections afforded a juvenile gave those adjudications "a high degree of reliability." Harris, 118 P.3d at 245. The court also opined that "if that adjudication qualifies as a prior conviction." it would be subject to judicial, rather than jury finding. Harris, 118 P.3d at 244 n. 8. However, the court went on to note that under Oregon law, juvenile adjudications are not considered criminal convictions. Harris, 118 P.3d at 245. That fact, and the Sixth

Amendment's division of authority between judge and jury, led the court to hold that while the use of prior juvenile adjudications at adult sentencing does not violate the Sixth Amendment, their existence "must be proved to a trier of fact" or admitted by the defendant. Harris, 118 P.3d at 246.

As the petitioner notes there has been a difference of opinion among various court regarding the use of prior juvenile adjudications at adult felony sentencing proceedings. Given the fact that even courts who disagree with the majority rule recognize that rule is reasonable and not in conflict with existing Supreme Court precedence, the degree of division between the courts does not warrant review in this case.

B. The Record In This Case Is Not Settled

Even if the degree to which courts have disagreed on the question were a reason to grant the petition, this case does not present a good factual basis on which to do so. The record in this case is not entirely clear.

At sentencing the defense acknowledged his prior juvenile adjudications. As a result, the State had no opportunity to produce a record at the trial court level establishing the defendant's prior juvenile adjudications and the manner in which they were obtained.

On appeal to the State Court of Appeals the defendant attacked the reliability of his prior juvenile adjudications on the basis that he had not been afforded a right to jury trial. State sought to establish those prior convictions were the result of the defendant's guilty plea and thus reliable regardless of any jury trial right. App. A-C. The defense moved to strike the plea and judgment forms appended to the State's brief. App. D. The State

moved to supplement the record. App. E. In light of the Court's ruling in Weber, the defendant's guilty pleas were unnecessary to the determination of the case. The Court chose not to rule on the motion. App. F. While the Court cannot ignore the fact the defendant pled guilty to his prior juvenile offenses, because it is now aware of that fact, it is not entirely clear what their status is in relation to this petition. If the Court were to leave out the fact of the defendant's guilty plea in its analysis, it could lead to a misleading, or at a minimum incomplete, result.

The fact the defendant had pled guilty to the prior juvenile offenses is significant in light of his argument. In Blakely v. Washington, 542 U.S. 296 (2004) this Court applied Apprendi's holding to Washington's sentencing scheme. The Court ruled that the statutory maximum for Apprendi purposes was the maximum that could be imposed without finding any additional facts. Blakely 542 U.S. at 303-304. Thus, juries, and not judges, must determine additional facts which could justify a sentence above the standard range ascribed for any offense. Even so, the Court recognized that a defendant may stipulate to those facts, thereby waiving his Apprendi rights. "When a defendant pleads guilty, the State is free to seek a judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Blakely, 542 U.S. at 310.

Here the defendant stipulated to the relevant facts. When he pled guilty in juvenile court he stipulated to the relevant facts. When he admitted those prior juvenile adjudications counted toward his offender score at his adult sentencing hearing in this case, he again stipulated to the relevant facts. Even if the defendant's argument were accepted, he would not be entitled to relief because he waived any jury trial right he argues that he should have had as a prerequisite to use of those adjudications in his adult sentencing hearing.

C. One Of The Defendant's Arguments Was Not Raised And Decided By The State Courts. The Court Does Not Have Jurisdiction To Consider That Argument.

The defendant claims the Court has jurisdiction to hear his case under 28 USC §1257(a). That provision allows the Supreme Court to review final judgments or decrees rendered by the highest court of a State in which a decision may be had where the validity of a statute of any state is drawn in question on the ground that it is repugnant to the Constitution. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb 451 U.S. 493, 496-497 (1981)

Here the defendant raises in two questions in which he seeks review. The first was litigated to final judgment in the State courts, the other was not.

The defendant first argues that the Sixth Amendment prohibits the use of his prior juvenile adjudications to enhance his adult sentence when the facts which constituted his criminal conduct were not found by a jury. This is the issue that he raised in the State court. The State court rendered a final decision on that issue when it rejected his argument on the basis of its decision in Weber.

The second issue is raised when he argues "[a]lternatively, the Court could hold – along the lines of the Oregon Supreme Court – that the Sixth Amendment allows defendants to contest before the current jury at least whether they were involved in the prior juvenile adjudications that the State alleges." Petition for Certiorari at 23. This issue raises the question whether the Sixth

Amendment requires that a defendant has a right to a jury determination on the existence of his prior convictions. Related to that question is whether the defendant has a right to a jury verdict on the identity of the individual named in the prior conviction. This is not the same question presented in the State court because it goes beyond the question of whether juvenile adjudications constitute "convictions" for Apprendi purposes.

It is an issue which has the potential to reach farther than prior juvenile adjudications. If the defendant has a right to a jury determination on the existence of his prior juvenile court adjudications, he could similarly argue he has a right to the same jury determination on his prior adult felony convictions. This is directly contrary to the Court's ruling in Almendarez – Torres, Jones, and Apprendi, reserving the question of prior conviction to judicial determination.

This Court has identified at least three reasons relevant here that petitioners must exhaust their issue in State court before being considered by the Court for review. It allows the State Court to correct any errors that may have occurred, it gives the parties the opportunity to develop the record necessary for adjudicating the issue, and it promotes judicial economy in the Supreme Court. Webb, 451 U.S. at 500-01.

Because the defendant never raised any issue with respect to his right to a jury trial on the existence of his prior juvenile court cases, that issue is not final within the meaning of 28 USC §1257(a). The Court does not have jurisdiction to consider that specific issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

FILED
JAN 29, 1993 – 3:35 P.M.
KAY D. ANDERSON, COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,	)	No. 92-8-01459-9
	)	
Petitioner,	)	STATEMENT OF
	)	JUVENILE ON
BOUNPONE B. SASOUVONG,	)	PLEA OF GUILTY
DOB: 01/11/77	)	
Respondent.	)	

1. My name is Bounpone Sasouvong.
2. My age is 16, and I have completed the 9th grade in school.
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.
4. My lawyer's name is Mark Voss.

5. I have been informed and fully understand that I am charged with the offense(s) of Taking a Motor Vehicle Without Permission, RCW 9A.56.070(1), a felony, and that the elements of the offense(s) are that the respondent, on or about the 23rd day of May, 1992, did intentionally and without permission of Vasily Stsiborsky, the owner and person entitled to the possession thereof, take and drive away a motor vehicle, to-wit: a brown 1982 Honda Accord, Washington license HXZ801, and, with knowledge that such motor vehicle had been unlawfully taken, did voluntarily ride in and upon such motor vehicle. I have been given a copy of the information.
6. I have been informed and fully understand that:
   (a) I have the right to a speedy and public trial in the county where the offense is alleged to have been committed.
   (b) I have the right to remain silent before and during trial, and I need not testify against myself.
   (c) I have the right at trial to hear and question witnesses who testify against me.
   (d) I have the right to testify on my own behalf and to have other witnesses testify for me. These witnesses can be made to appear at no expense to me.
   (e) I am presumed innocent until the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
   (f) I have a right to appeal a determination of guilt after trial.
   (g) If I plead guilty I give up the rights in statements 6(a)-(f). If the court in making its disposition enters a disposition outside the standard range,

after making a finding of manifest injustice, I understand that either the State or I may appeal.

18. The court has asked me to state in my own words what I did that makes me guilty of this offense. This is my statement. On or about May 23, 1992, myself and some other boys took a motor vehicle without permission. This happened in Snohomish County.
20. I plead guilty to the charge(s) as alleged on #5 on page 1.
21. I make this plea freely and voluntarily. No one has threatened to harm me or anyone else in order to have me plead guilty.

01/28/93	Sasouvong Bounpone
Dated	Respondent

I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement.

01/28/93	Mark Voss
Date	Attorney for Respondent

The above statement was read by or to the respondent and signed by the respondent [X] in the presence of his/her attorney, after having knowingly, voluntarily and intelligently waived his/her right to an attorney, and in the presence of the undersigned Judge/Court Commissioner in open court. The court finds the respondent's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the respondent of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the respondent is guilty as charged.

01/28/93	Joan Sullivan
Date	Judge

Approved for Entry:

Helene Blume	Mark Voss
Deputy Prosecuting Attorney	Attorney for Respondent
WSBA #15462	WSBA #19101

APPENDIX B

FILED
MAR 18, 1993 – 10:17 A.M.
KAY D. ANDERSON, COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,	)	No. 93-8-00039-1
	)	
Petitioner,	)	STATEMENT OF
	)	JUVENILE ON
BOUNPONE B. SASOUVONG,	)	PLEA OF GUILTY
DOB: 01/11/77	)	
Respondent.	)	

1. My name is Bounpone Sasouvong.
2. My age is 16, and I have completed the 9th grade in school.
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.

4. My lawyer's name is Mark Voss.
5. I have been informed and fully understand that I am charged with the offense(s) of Taking a Motor Vehicle Without Permission, and that the elements of the offense(s) are on July 27, 1992, did intentionally and without permission of Jason Schoales, the owner and person entitled to the possession thereof, take and drive away a motor vehicle, to-wit: a red 1983 Honda Prelude, Washington license 498AJP, and with knowledge that such motor vehicle had been unlawfully taken, did voluntarily ride in and upon such motor vehicle. I have been given a copy of the information.
6. I have been informed and fully understand that:
    a. I have the right to a speedy and public trial in the county where the offense is alleged to have been committed.
    b. I have the right to remain silent before and during trial, and I need not testify against myself.
    c. I have the right at trial to hear and question witnesses who testify against me.
    d. I have the right to testify on my own behalf and to have other witnesses testify for me. These witnesses can be made to appear at no expense to me.
    e. I am presumed innocent until the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
    f. I have a right to appeal a determination of guilt after trial.
    g. If I plead guilty I give up the rights in statements 6(a)-(f). If the court in making its disposition enters a disposition outside the standard range.

after making a finding of manifest injustice, I understand that either the State or I may appeal....

18. The court has asked me to state in my own words what I did that makes me guilty of this offense. This is my statement. On July 27th 1992 I acted as a lookout for my friends when they took a 1983 Honda Prelude. I rode in the car knowing it had been stolen. This happened in Snohomish County.
20. I plead guilty to the charge(s) as alleged on #5 on page 1.
21. I make this plea freely and voluntarily. No one has threatened to harm me or anyone else in order to have me plead guilty.

03/15/93 — Dated

Sasouvong Bounpone — Respondent

I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement.

03/15/93 — Date

Mark Voss — Attorney for Respondent

The court finds the respondent's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the respondent of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the respondent is guilty as charged.

03/15/93 — Date

Paul D. Hansen — Judge

Approved for Entry:

Randall Yates	Mark Voss
Deputy Prosecuting Attorney	Attorney for Respondent
WSBA #8305	WSBA #19101

APPENDIX C

FILED
MAR 15, 1994
KING COUNTY SUPERIOR COURT CLERK
KING CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,	)	No. 93-8-07605-5
	)	
Petitioner,	)	STATEMENT OF
	)	JUVENILE ON
BOUNPONE B. SASOUVONG,	)	PLEA OF GUILTY
DOB: 01/11/77	)	
Respondent.	)	

1. My name is Bounpone Sasouvong.
2. My age is 17.
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.

4. My lawyer is Jean Rietschel.
5. I have been informed and fully understand that I am charged with the offense of Taking a Motor Vehicle Without Permission, Residential Burglary – 2 counts, and that the elements of the offense are TMVOP – with knowledge that a motor vehicle has been taken unlawfully, voluntarily ride in the vehicle. Res Burg: Enter and remain unlawfully in a dwelling with intent to commit a crime and that I have been given a copy of the charge.
6. I have been informed and fully understand that:
    a. I have the right to a speedy and public trial in the county where I reside or where the offense is alleged to have been committed.
    b. I have the right to remain silent before and during trial, and I need not testify against myself.
    c. I have the right to hear and question witnesses who might testify against me.
    d. I have the right to have witnesses testify for me. These witnesses may be required to appear at not cost to me.
    e. I have the right to testify on my own behalf.
    f. I am presumed innocent until each element of the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
    g. I have a right to appeal a determination of guilt after a trial.
    h. If I plead guilty I give up the rights enumerated in 6(a)-(g).

14. The court has asked me to state in my own words what I did that resulted in my being charged with the offense. This is my statement. On 12/12/93 in King Co I was a passenger in a Dodge Van knowing it had

been unlawfully taken from Robert & Mariam Hunt. On 12/13/93 in King Co I unlawfully entered the dwellings of Dennis Roosendaal, Robin Pratt and Diat Kuamme with the intent to commit a crime.

15. I plead guilty to the charge.

03/15/94 — Dated

Sasouvong Bounpone — Respondent

The court finds the offender's plea of guilty is knowingly, intelligently and voluntarily made, that the juvenile has been advised by the court concerning the nature of the offense, that there is a factual basis for the plea and that the offender is guilty as charged.

03/15/94 — Date

Jean Rietschel, WSBA #7739
Defense Attorney

John C. Dorgan, WSBA #21930
Prosecuting Attorney

03/15/94 — Date

Mary W. Brucker — Judge

APPENDIX D

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON,	)	
	)	No. 54422-5-I
Respondent,	)	
	)	MOTION TO STRIKE
BOUNPONE SASOUVONG,	)	STATE'S RESPONSE
	)	BRIEF
Appellant.	)	

A. IDENTITY OF MOVING PARTY

The appellant, Bounpone B. Sasouvong, through his attorney, Elaine L. Winters, moves this Court to strike the State's Response brief as explained in Part B.

B. STATEMENT OF RELIEF SOUGHT

Specifically, Mr. Sasouvong argues the following portions of the Brief of Respondent are improper: (1) Appendix A, (2) Appendix B, (3) Appendix C, and (4) references to the material contained in the appendixes and argument based upon that material at pages 13-14.

C. FACTS RELEVANT TO MOTION

...

The Snohomish County Prosecuting Attorney's Response Brief includes three appendixes:

Appendix A – Information, Statement of Juvenile on Plea of Guilty, and Disposition Order in Snohomish County Juvenile Court Cause Number 92-8-01459-9.

Appendix B – Information, Disposition Order, and Statement of Juvenile on Plea of Guilty in Snohomish County Juvenile Court Cause Number 93-8-00039-1.

Appendix C – Information, First Amended Information, one page of a Certification in Support of Motion and Order Permitting Amendment of Information, Statement of Juvenile Offender on Plea of Guilty and Order Transferring Jurisdiction in King County Juvenile Court Cause Number 93-8-07605-5 and Disposition Order in Snohomish County Juvenile Court Cause Number 94-8-00490-5.

None of the documents included in the three appendixes were before the Superior Court when Mr. Sasouvong was sentenced, and they are not part of the record on appeal.

...

E. CONCLUSION

For the reasons stated above, Mr. Sasouvong requests this Court strike the State's Response Brief and order the State to file a brief deleting the improper portions of the brief within 7 days.

DATED this 15th day of February, 2005.

Respectfully submitted,
Elaine L. Winters, WSBA #7780
Attorney for Appellant

APPENDIX E

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON,	) No. 54422-5-I
	)
Respondent,	) STATE'S RESPONSE TO
	) DEFENDANT'S MOTION
BOUNPONE SASOUVONG,	) TO STRIKE STATE'S
	) BRIEF AND STATE'S
Appellant.	) COUNTER MOTION TO
	) STRIKE A PORTION OF
	) THE DEFENDANT'S
	) BRIEF OR IN THE
	) ALTERNATIVE TO
	) ALLOW THE RECORD
	) TO BE SUPPLEMENTED

I. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

The State requests the court deny the defendant's motion to strike the State's response brief and take judicial notice of the court documents setting out the defendant's prior juvenile convictions by guilty plea, or allow the State to supplement the

record with those documents contained in Appendix A, B, and C to the State's response brief.

III. FACTS RELEVANT TO MOTION

...

The defendant was convicted by jury verdict of Residential Burglary in Snohomish County Superior Court. At sentencing the State presented the court with sentencing materials that included the defendant's "Appendix A". Appendix A contained all of the defendant's prior criminal history, including the nature of the charge, date, location and court in which those convictions were adjudicated. The defendant raised no issue regarding the use of his juvenile court convictions to determine his offender score at the time of sentencing. He did not object when the court included them in his offender score.

...

IV. GROUNDS FOR RELIEF AND ARGUMENT

The defendant's motion to strike the State's brief should be denied. While the actual documents that are contained in the appendices were not before the trial court, the court was aware of those convict ions by virtue of the Appendix A that had been supplied to the trial court at sentencing. Further, they are records form the same Superior Court in which the defendant was sentenced. The trial court as well as the Court of Appeals can take judicial notice of those records and their contents.

Additional evidence may supplement the record if (1) it is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is

inadequate or unnecessarily expensive, and it would be inequitable to decide the case solely on the evidence already taken in the trial court. RAP 9.11(a). If the Court does not take judicial notice of the records of the defendant's juvenile convictions the Court should grant the State's motion to supplement the record.

Respectfully submitted on February 22, 2005.

Kathleen Webber, WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX F

The Court of Appeals
of the
State of Washington

Richard D. Johnson,
Court Administrator/Clerk

Division I
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June 29, 2005

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CASE #54422-5-I
State of Washington, Resp/Cross App v. Bounpone B. Sasouvong, App/Cross Resp

Counsel:
The following notation ruling by Commissioner Susan Craighead of the Court was entered on June 28, 2005:

"As State v. Weber, No. 52911-1 has been decided, the stay is lifted. The file contains a motion to strike the respondent's brief on the basis that the State attached and relied on information that was not before the sentencing court regarding appellant's juvenile convictions. In light of Weber, it seems most practical for the court to simply disregard information that was not before the trial court rather than require the State to file a new brief. However, if appellant at this point wants the court to rule on his motion, he should inform the court by letter by July 8, 2005 and I will do so.

Sincerely,
Richard D. Johnson
Court Administrator Clerk

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(3)

No. 06-1543

FILED
AUG 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Bounpone B. Sasouvong,
Petitioner,

v.

Washington,
Respondent.

On Petition for Writ of Certiorari
to the Washington Court of Appeals, Division I

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State does not dispute the importance of the question whether the Sixth and Fourteenth Amendments permit a court to enhance a criminal defendant's sentence based on a prior juvenile adjudication that he never had a right to contest before a jury. Nor does the State dispute that federal courts of appeals and state courts of last resort are intractably divided over the issue. The State does not even seriously respond to petitioner's explanation as to why the Washington Supreme Court majority's resolution of this issue is incorrect. *See* Pet. for Cert. 17-21.

Instead, the State advances three minor, formalistic grounds for denying review. As petitioner now demonstrates, none detracts from the need for this Court to resolve the constitutional question presented or its ability to do so in this case.

1. The State asserts that the conflict over the question presented turns to some extent over differences in state law. Some states, the State suggests, preclude juvenile adjudications obtained without the possibility of a jury from being considered "convictions," whereas others do not. BIO 8-9. None of the six federal courts of appeals or five state courts of last resort to address the question presented has ever advanced this proposition. And for good reason. The question whether a prior juvenile adjudication that the defendant did not have the opportunity to challenge before a jury constitutes a "conviction" for purposes of the *Almendarez-Torres* exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is obviously one of federal law. It does not, and cannot, turn in any way on how a state "labels" juvenile adjudications for purposes of a state-law sentence enhancement provision. *Apprendi*, 530 U.S. at 494.

Furthermore, to the extent the State suggests that substantive Washington law with respect to juvenile adjudications is materially different from Louisiana's or Oregon's, BIO 5-6, 8-9, the State simply misrepresents Washington

law. The Washington Constitution, just like the Louisiana Constitution (*see* BIO 8), requires all "criminal prosecutions" to be subject to jury trial. Wash. Const. art. I, sec. 22. And the Washington Supreme Court, just like the Oregon Supreme Court (*see* BIO 8), has made it perfectly clear that "[u]nder the juvenile code, a court order adjudging a juvenile a delinquent 'shall in no case be deemed a conviction of a crime.'" *State v. Schaaf*, 743 P.2d 240, 243 (Wash. 1987) (quoting Wash. Rev. Code § 13.04.240). Accordingly, the Washington courts have held over and over – each time at the State's urging – that because "[j]uvenile proceedings [are] rehabilitative in nature and distinguishable from adult criminal prosecutions," juveniles need not be afforded the right to jury trial under Washington law or the Sixth Amendment. *Schaaf*, 743 P.2d at 242; *accord State v. Meade*, 120 P.3d 975, 978-79 (Wash. App. 2005); *State v. Tai N.*, 113 P.3d 19, 22 (Wash. App. 2005). The only way for the State to get around these holdings here would be for it to dismantle its current juvenile justice system.

2. The State argues that this case is a problematic vehicle for resolving the question presented because the record lacks copies of documents purporting to show that petitioner pleaded guilty to the prior juvenile offenses the trial court used to enhance his sentence. BIO 9-10. The State is wrong. As the Washington Court of Appeals made clear, copies of actual judgments reflecting juvenile adjudications are unnecessary under Washington law to enhance a defendant's sentence. BIO App. 19a. So the question whether Washington's procedures for enhancing sentences based on juvenile adjudications comport with the Sixth Amendment is squarely presented.

Insofar as the State further argues that these documents would show that petitioner "waived any jury trial right he argues that he should have had," BIO 10, the State is mistaken. This Court observed in passing in *Blakely v. Washington*, 542 U.S. 296, 310 (2004), that defendants are

free to "stipulate[] to the relevant facts" with respect to a sentence enhancement. But nothing in that observation altered the longstanding rule that any waiver of the right to jury trial must be "an intentional relinquishment or abandonment of a known right." *Boykin v. Alabama*, 395 U.S. 238, 242-43 & n.5 (1969). When petitioner allegedly pleaded guilty to his juvenile offenses at issue here, he did not have the right to a jury trial, so he obviously could not then have waived that right. Likewise, while petitioner declined in the trial court here to challenge the accuracy of the State's representation that he had a juvenile record, he never renounced the argument that the Washington procedures that allow judges instead of juries to find these sentence-enhancing facts violate the Sixth and Fourteenth Amendments.[1] Indeed, after the trial court entered judgment, petitioner properly raised that constitutional argument in the Washington Court of Appeals, which rejected it on the merits. Pet. App. 1a; *see* Wash. R. App. P. 2.5(a) (constitutional arguments may be raised for first time on appeal). That is all that is necessary for purposes of his continuing to press that contention in this Court.

3. Finally, the State asserts that this Court lacks jurisdiction to consider holding – as the Oregon Supreme Court has – that the Sixth Amendment requires allowing a defendant to dispute the existence of sentence-enhancing prior juvenile adjudications, but not the alleged conduct underlying those adjudications, before a jury. BIO 11-12.

---

[1] To be clear, petitioner "admitted" (BIO 10) in the trial court *only as a matter of Washington law* that his prior juvenile adjudications counted toward his offender score. He never conceded that the alleged adjudications could be so counted consistent with federal constitutional law. Nor did petitioner ever "stipulate" (BIO 10) to the accuracy of the purported adjudications. (And even if he had so stipulated, it still would not matter. The right to trial by jury applies even when the prosecution's allegations are undisputed, for juries have the power to return verdicts declining to impose sentence enhancements even when the facts support such enhancements. *See* Pet. for Cert. 15-16, 19-20.)

This proposition is specious. Petitioner submitted the Oregon Supreme Court's decision in *State v. Harris*, 118 P.3d 236 (Or. 2005), to the Washington Court of Appeals in a statement of additional authority filed on September 8, 2005. The decision is effectively a "lesser included" version of the argument petitioner has consistently advanced – namely, that the Sixth Amendment prohibits a court from enhancing a defendant's sentence on the basis of juvenile adjudications unless a jury finds that the defendant actually commited the wrongful behavior underlying the adjudication. Accordingly, there cannot be any doubt that this Court has jurisdiction to consider both these variations of exactly what the Sixth Amendment requires here.

* * *

The issue whether a criminal defendant's sentence may be enhanced based on a prior juvenile adjudication that he never had a right to contest before a jury is not going to go away. It is extremely important. And lower court decisions such as the Washington Supreme Court's that governed here strip defendants of a constitutional guarantee that is vital to our system of popular "control in the judiciary." *Blakely*, 542 U.S. at 306. This Court should settle this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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